accession 23918

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 140.

THE STATE OF LOUISIANA EX REL. THE NEW YORK GUARANTY AND INDEMNITY COMPANY, PLAINTIFF IN ERROR,

vs.

OLIVER B. STEELE, AUDITOR OF PUBLIC ACCOUNTS OF LOUISIANA, SUBSTITUTED FOR ALLEN JUMEL, AUDITOR, &c.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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a No. 9469.

Civil District Court for the Parish of Orleans.

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY *vs.* ALLEN JUMEL, Auditor of Public Accounts.	No. 10679, Division "A."

Messrs. Kennard, Howe & Prentiss, attorneys for plaintiff and appellee.

M. J. Cunningham, attorney general, for defendant.

Transcript of appeal returnable to the honorable the supreme court of Louisiana, at New Orleans, on the first Monday in May, 1885.

Supreme Court of Louisiana.

Filed May 16th, 1886.
(Signed) WM. DUPRE,
Deputy Clerk.

1 STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

STATE OF LA. *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY *vs.* ALLEN JUMEL, Auditor of Public Accounts, etc.	No. 10679, Division "A."

Petition. Filed February 14, 1884.

To the honorable the judges of the civil district court for the parish of Orleans:

The petition of the State of Louisiana on the relation of the New York Guaranty & Indemnity Company, a corporation duly created by and under the laws of the State of New York and domiciled in the city of New York, and of whose charter a copy is hereto annexed and made part hereof as Exhibit "A" of this petition, respectfully represents—

That the relator is now and has been since July, 1871, for value and in good faith, the holder and owner, by lawful pledge and by purchase thereunder, of two hundred and fifty bonds made, executed, and issued by the State of Louisiana under and in accordance with the provisions of the act of her General Assembly, No. 116 of 1869, entitled "An act providing State aid in the construction of the Mississippi & Mexican Gulf Ship Canal, and for the issue of 2 State bonds therefor," approved March 8th, 1869, each of said bonds being for the sum of one thousand dollars and having fifty-one coupons attached of thirty-six $\frac{50}{100}$ dollars each, payable respectively on the first of March and first September of each year until the maturity of said bonds; that each of said bonds is dated March 1st, 1869, is endorsed by the president and treasurer of said canal company, and has thirty years to run. A list of said bonds by their numbers is hereto attached as part hereto [hereof] and as Exhibit "B." Said bonds are signed by the Governor and secretary of state of Louisiana, and have the seal of the State affixed, and certify under said signatures and seal that said bonds have each been issued for the purpose of said act "to aid in the construction of the Mississippi and Mexican Gulf ship canal," and that for the principal and accruing interest on said bonds the faith and credit of the State of Louisiana are pledged by said act of the General Assembly No. 116, approved March 8, 1869, and which is published in full on the reverse of each of said bonds, as by the said bonds will more fully appear; and one of said bonds, with the coupons, being No. 192, is hereto annexed, as Exhibit "C," as a sample of the whole, the rest being the same except in serial number.

That said bonds have been repeatedly recognized as a part of the State debt by all branches of the State government, and were pleaded and recognized as such by and for the credit of the State in the case of The State *vs.* Graham, No. 3358 of the docket of the supreme court of Louisiana.

That the interest was duly paid by the State on said bonds up to
and including 1st September, 1873, but has never *has* been
3 paid since that time, and the arrears of interest on the whole
issue, to wit, on the issue of $474,000, or what remains outstanding up to September, 1883, is upwards of $200,000, which it is the duty of the State of Louisiana to pay, but which payment has been neglected and refused; that the said canal company has, since September, 1873, failed to meet any of its obligations under the fourth and sixth sections of said act; and, the deficit in interest being as aforesaid, it is the duty of the auditor of public accounts to proceed under and execute the said law No. 116 of 1869, so far as he is concerned, and especially the seventh section thereof, by calculating the rate of taxation on the total assessed value of all the movable and immovable property in the State sufficient to pay said deficit in interest, and by notifying the several sheriffs and tax-collectors of the rate of taxation so ascertained and fixed, and to require them to collect the same in the manner provided for by law for other taxes.

That the arrears of interest due relator exceed the sum of $180,000.

That the relator has duly demanded of Allen Jumel, the auditor of public accounts of the State of Louisiana, that he should perform his duty under said law as aforesaid, and he has refused to do so.

Wherefore relator prays that a mandamus may issue herein according to law commanding said Allen Jumel, auditor of public accounts of the State of Louisiana, to comply with his duty in the premises under and in accordance with the act No. 116 of 1869, and
especially under the seventh section thereof, by calculating
4 the rate of taxation on all the movable and immovable prop-

erty in the State sufficient to pay the deficit in interest on said issue of bonds, made under said act, from September 1, 1873, to September, 1883, say the sum of $200,000, or so much as may be necessary, and by notifying the several sheriffs and tax-collectors throughout the State of said rate so ascertained and fixed, and requiring them, respectively, to collect the same in the manner provided by law for other taxes, and to do and perform such other act in the premises as may be his official duty, and for all other relief, and that after due proceedings had said mandamus may be made peremptory.

(Signed) KENNARD, HOWE & PRENTISS,
Att'ys for Relator.

Affidavit.

STATE OF NEW YORK,
City and County of New York, } *ss:*

James P. Wallace, of New York, being duly sworn, says that he is the president of The New York Guaranty & Indemnity Company, the relator herein; that the foregoing petition is true to his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) JAMES P. WALLACE.

Subscribed in my presence and sworn to before me, at New York city, county, and State, by the said James P. Wallace this 1st
5 day of February, 1884.

In witness whereof I have hereunto set my hand and affixed my official seal on this 1st day of February, 1884.

(Signed) CHARLES EDGAR MILLS,
Commissioner for Louisiana in New York,
115 & 117 *Broadway, N. Y. City.*

Order.

Let an alternative writ of mandamus issue, as herein prayed for and according to law, returnable on Friday, the 29th day of February, 1884, at 11 o'clock a. m.

(Signed) A. L. TISSOT, *Judge.*

Writ of Mandamus.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY
vs.
ALLEN JUMEL, Auditor of Public Accounts of the State of Louisiana.
} No. 10679.

The State of Louisiana to Allen Jumel, auditor of public accounts of the State of Louisiana, Greeting:

You are hereby commanded, in the name of the State of Louisiana and of the civil district court for the parish of Orleans, to comply with the demand of the relator herein as contained in the petition, a copy of which accompanies this writ and is made a part hereof, or show cause to the contrary on Friday, the 29th day of February, 1884, at 11 o'clock a. m.

6 Witness the Honorables A. L. Tissot, W. T. Houston, F. A. Monroe, N. H. Rightor, Henry L. Lazarus, judges to our said court, this 15th day of February, in the year of our Lord one thousand eight hundred and eighty-four, and in the one hundred and eighth year of the Independence of the United States.

(Signed) JAMES D. RANKIN,
Deputy Clerk.

Return to Writ of Mandamus. Filed February 23, 1884.

Received a certified copy of the order and writ of mandamus, together with petition, February 19th, 1884, and on the same day, month, and year I served the same on Allen Jumel, State auditor of public accounts, by leaving the same at his office, in the city of Baton Rouge, in the hands of his clerk and book-keeper, Frank H. Green, over the age of fourteen years, said Allen Jumel being absent from said city at the time of said service.

Those names and other facts connected with this service I learned by interrogating the said Frank H. Green.

(Signed) SAM. SKOLFIELD,
Deputy Sheriff, Parish East Baton Rouge.

Appearance and Motion of Auditor for Time in which to Answer. Filed March 7, 1884.

STATE *ex rel.* NEW YORK GUARANTY AND INDEMNITY COMPANY
vs.
ALLEN JUMEL, Auditor.
} Civil District Court. No. 10679, Division "A."

7 Now into court comes J. C. Egan, attorney general, and files this appearance for respondent, and asks for an extension of time in which to answer.

It is ordered that time be allowed respondent, and the case be continued indefinitely.

(Signed) J. C. EGAN, *Att'y Gen'l.*
W. B. SOMERVILLE, *Att'y.*

N. O., March 7, 1884.

Motion of Relator to Make Party. Filed Nov. 3, 1884.

STATE *ex rel.* N. Y. G. & I. Co.
vs.
ALLEN JUMEL, Auditor, &c.
} No. 10679. Civil District Court, Division "A."

On motion of Kennard, Howe & Prentiss, attorneys for relator, and suggesting that Allen Jumel, who has appeared herein as defendant, has been succeeded in office by O. B. Steele, ordered that the said O. B. Steele be made party defendant herein, and that a copy of this order be duly served.

Return on Motion to Make Party. Filed Nov. 13, 1884.

STATE *ex rel.* N. Y. G. & I. Co.
vs.
ALLEN JUMEL.
} No. 10679. Civil District Court.

Rec'd Nov. 4, 1884, and on Nov. 5, 1884, I served a copy of the within rule personally on M. J. Cunningham, attorney general, herein named. Ret. same day.

(Signed) P. A. McINTYRE,
Deputy Sheriff.

8 *Motion of Relator to Fix Proceeding. Filed Dec. 15, 1884.*

STATE *ex rel.* N. Y. GUARANTY & INDEMNITY CO.
vs.
ALLEN JUMEL *et al.*
} Div. A, No. 10679.

On motion of Kennard, Howe & Prentiss, for relator, ordered that this proceeding be fixed for Friday, the 19th December, at 11 a. m., and that the attorney general be notified.

Return on Motion to Fix Proceeding. Filed Dec. 16, 1884.

STATE *ex rel.* N. Y. GUARANTY CO.
vs.
ALLEN JUMEL *et als.*
} No. 10679. Civil District Court for the Parish of Orleans.

Received December 15, 1884, and on the 15th day of Dec., 1884, I served a copy of the within notice of trial on M. J. Cunningham, attorney general, by leaving the same at his office, corner Carondelet and Camp St., in the hands of James Moise, his clerk, in person. Ret. same day.

(Signed) P. A. McINTYRE,
Deputy Sheriff.

Motion of Relator to Fix Mandamus. Filed January 7, 1885.

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY CO. *vs.* ALLEN JUMEL, Auditor, &c.	No. 10679, Div. A. Civil District Court for the Parish of Orleans.

9 On motion of Kennard, Howe & Prentiss, attorneys for relator, it is ordered that the application herein for mandamus be fixed for trial on Friday, the 16th day of January, 1885, at 11 a. m., and that the attorney general be notified.

Return on Motion to Fix Mandamus. Filed Jan'y 10, 1885.

STATE *ex rel.* N. Y. GUARANTY CO. *vs.* ALLEN JUMEL, Auditor.	No. 10679. Civil District Court for the Parish of Orleans.

Rec'd Jan'y 7, 1885, and on the same day, month, and year I served a copy of the within notice of trial personally on Hon. M. J. Cunningham, attorney general, herein named.

Ret'd same day.

(Signed) P. A. McINTYRE,
Deputy Sheriff.

Answer. Filed Jan'y 16, 1885.

STATE OF LA. *ex rel.* NEW YORK Guaranty & Indemnity Company *vs.* ALLEN JUMEL, Auditor of Public Accounts of the State of Louisiana.	No. 10679. Civil District Court, Parish of Orleans.

Now comes O. B. Steele, auditor, made party defendant herein, by the attorney general, and shows cause why he should not comply with relator's demand, and why the writ of mandamus prayed for should not be granted or made peremptory as follows:

Notwithstanding the verbiage of relator's petition and of section 7 of act 116 of 1869, the duty or act which the relator asks 10 at respondent's hands is the levy and collection of a tax; that taxation is an act of sovereignty which can be performed only by the legislative branch of our Government and cannot be delegated by it, except to municipal corporations, &c., as specially authorized by the Constitution; that therefore said section 7 could not, as it intended and purported to do, confer upon resp't the power to levy a tax to pay the bonds provided for by said act 116; that if the Legislature could then confer and resp't could then exercise the power, which he denies, he cannot do so now because art.

15 of the present constitution prohibits him (an officer in the executive department of the Government) from exercising any power properly belonging to the legislative department, as the power of taxation certainly does. Art. 14 divides the powers of Government into three distinct departments and confides each to a separate body of magistracy; art. 15 prohibits each department from exercising any power belonging to the other, and art. 202 specially provides that the taxing power shall be exercised by the Legislature; that act 116 of 1869 is in conflict with and repealed by act 3 of 1874, by which act the grant of State aid under act 116 was also repealed and annulled; that by act 55 of 1874 respondent and all other officers of the State are prohibited from complying with the mandamus sued for by relator and deprived of all power and authority to assess, collect, or enforce the payment of the tax asked for by relator; that by said act this court is prohibited from entertaining jurisdiction of this suit or proceeding to assess said tax. Said tax if levied would have no force and be of no value, and respondent is deprived of all authority to set apart any funds or do any
other act for the payment of the principal or interest
11 of relator's bonds; that the State tax for all purposes is
limited by the constitution to six mills, the whole of which has been levied by the Legislature and applied to purposes other than relator's bonds or coupons, and no department of the Government and no officer has the power to levy or collect the tax asked for by relator, because the relief sought and also said act 116 of 1869 are in conflict with the present constitution; that respondent can only be compelled by mandamus to perform a purely ministerial duty, clearly prescribed by law, while relator seeks to compel the performance of an act in direct violation of the constitution and laws; that act 116 of 1869 has been abrogated and relator's remedy thereunder, if any he had, taken away by the sovereign State of Louisiana through its laws adopted by its Legislature, and the amendment of the old and the adoption of the new constitution, regularly presented and ratified by the people, which solemn and sovereign acts relator seeks to overcome and annul by this mandamus proceeding; that, although this proceeding is taken out against respondent alone, its effect is to disregard and annul the said acts of the State, which plaintiff cannot bring and this honorable court cannot entertain without its consent, and in which respondent has no power or capacity to represent and bind the State; that in the suit of these relators, as plaintiffs, against the Board of Liquidation of the State of Louisiana, No. 8317 in fifth district court, No. 6939 in State supreme court, and No. 233 in the Supreme Court of the United States, it has, in pursuance of law and in a proper proceeding, been decided that relator's bonds are not legal and valid obliga-
tions of the State; that they were issued in violation of the
12 constitution and law and without any valid consideration;
that relators were affected with notice of the requirements, conditions, and provisions of the law under which they were issued, and that these requirements and conditions had not been complied with, all which questions are *res adjudicata* against relator, and are so

pleaded; that no recognition or acknowledgment by any officer or branch of the Government will or can bind the State to pay an obligation which is illegal, invalid, and without consideration; that said bonds are no better in relator's hands than in those of payees, because of said judgment and because all transferees of public securities are affected with notice, and are bound at their peril to see that the bonds are authorized by and issued in accordance with law, and that all conditions and requirements have been complied with, all duties performed, and all obligations discharged which were prescribed as a basis or consideration of the bonds.

Respondent specially denies each and every allegation and statement in relator's petition not herein admitted.

Wherefore respondent prays that relator's demand be rejected and this suit dismissed at his costs, and for general relief.

(Signed) M. J. CUNNINGHAM,
Attorney General.

Motion of Relator to Fix Mandamus. Filed Feb. 2, 1885.

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY
vs.
ALLEN JUMEL, Louisiana State Auditor, *et al.*
No. 10679. Civil District Court, Parish of Orleans.

13 On motion of Kennard, Howe & Prentiss, attorneys for relator, it is ordered that the application for mandamus herein be set down for trial on Friday, the 13th day of February, 1885, at 11 a. m., and that the attorney general be notified thereof.

Service accepted and notice waived.
N. O., Jan'y 30, 1885.
(Signed) M. J. CUNNINGHAM,
Attorney General.

Supplemental Answer. Filed March 3, 1885.

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY
vs.
ALLEN JUMEL, Auditor.
No. 10679. Civil District Court, Division A.

Now comes O. B. Steele, auditor, defendant herein, by the attorney general, and files this supplemental answer to relator's petition.

In addition to the causes shown in his original answer why relator's prayer should not be granted and the mandamus herein made peremptory, respondent shows the following additional cause, to wit:

Act 116 of 1869 did not comply with the requirements of article 111 of the constitution of 1868 by adequately providing for the payment of the current interest and principal of the bonds which, it is claimed, were to be issued and were issued under its authority. 14 If it is claimed that such provision was made by sections 6 and 7, which is hereby denied, that said act was in violation of article 114 of said constitution, because no such effect is stated in the title of the act. Said act 116 was and is, therefore, for these additional reasons unconstitutional, null, and void.

(Signed) M. J. CUNNINGHAM,
Attorney General.

Order.

Let the supplemental answer of defendant be filed according to law.

New Orleans, March 13, 1885.

(Signed) A. L. TISSOT, *Judge.*

Note of Evidence for Plaintiff and Defendant. Filed March 13, 1885.

STATE *ex rel.* NEW YORK G. & I. COMPANY
vs.
ALLEN JUMEL, &c.; O. B. STEELE, Substituted Auditor, &c.
No. 10679. Civil District Court.

Relator offers, introduces, and files—

1st. Copy of its charter, being Exhibit A of petition. It is consented that in case of appeal it may go up in original.

2d. List of bonds in suit held by it, being Exhibit B of petition.

3d. Offers the bonds and their coupons sued on, described 15 in the petition, and the endorsements thereof by the president and secretary of the Mississippi & Mexican Gulf Ship Canal Company, and the act of 1869 printed thereon. To save expense it is agreed that bond No. 192, Exhibit C of the petition, shall be introduced and filed as a sample of the 250 bonds set forth in the petition and held by relator, and their coupons, and of the endorsements and printed matter thereon; in case of appeal to go up in original. It is conceded that the bonds described in the petition and exhibits are the same sought to be funded in the suit 8317, late 5th district court, and that relator acquired them in July and August, 1871, and under the circumstances stated in the depositions taken by commission in the said case 8317, late 5th district court, parish of Orleans, on behalf of present relator, plaintiff therein, being testimony of Babcock and Marden. Said depositions are offered by relator, and no objection is made that they are entitled and taken in another suit; stamped copy filed and marked "D." All other objections are reserved and will be urged to the admissibility and effect of the evidence.

"X."

On Writ of Error to Supreme Court of Louisiana.

STATE *ex rel.* N. Y. GUARANTY & INDEMNITY COMPANY
vs.
OLIVER B. STEELE, Substituted, &c.

In this cause the specimen bond No. 192, offered in evidence by relator, as shown at p. 15 of the transcript, may be taken up to and produced in the Supreme Court of the United States on original, and copied with statement and specimen of coupons in brief of plaintiff in error, and this agreement may be annexed to the transcript at said page 15.

W. W. HOWE,
For Pl'ff in Error.
M. J. CUNNINGHAM,
Att'y Gen'l of La., for Def't in Error.

Sept. 29, 1886.

4th. Copy statement of auditor, being Exhibit C, at p. 65, record 3358, supreme court of Louisiana, in case entitled State *ex rel.* Salomon & Simpson *vs.* James Graham, auditor, marked in this case "E," stamped copy filed.

Offers opinion of supreme court in same case, to be referred to in original report (23 A., 402).

16 5th. Certificate of State treasurer of registration of bonds in suit, marked "F," stamped copy filed.

Respondent offers—

Petition, list of bonds, and judgment of fifth district court in said case No. 8317, and opinion and decree of supreme court of Louisiana in same cause, copies to be furnished; opinion and decree of Supreme Court of the United States in same cause, as reported in 15 Otto, p. 622, to be referred to in the said report in *ane* court; application for rehearing and its refusal; petition for writ of error and writ of error in same cause.

Relator reserves and will urge all legal objections to the admissibility and effect of the evidence offered by respondent, the true effect of this agreement being for each party to waive all objections to form and reserve all objections affecting the substance of the evidence offered by the other party.

Relator offers, introduces, and files requisitions, certificates, and reports — State engineers as follows:

"G." Requisition of Governor, April 19, 1869.

"H." Detail of M. J. Thompson, April 20, 1869.

"I." Certificate of M. J. Thompson, acting chief engineer board of public works, April 23, 1869.

"K." Certificate of M. J. Thompson, chief engineer, June 16, 1870.

"L." Report of same, Dec. 31, 1870.

" M." Report of same, June 19, 1872.

" N." Report of board of State engineers, Dec. 31, 1872.

17 Stamped copies filed subject to all other legal objections by defendant; also within demand by relator on auditor, stamped copy, marked " O."

Statement by W. W. Howe that said demand was refused before suit brought, marked " P."

It is admitted that no interest has been paid on any State bonds since the passage of act No. 3 of 1874, except on bonds issued under that act and bonds issued under constitution of 1879, and that the Mississippi & Mexican Gulf Ship Canal Company have not deposited in the State treasury the money to pay the interest on bonds issued under act 116 of 1869, in accordance with section 4 of said act and section 6, except as stated in letter of James Campbell, clerk of State treasurer, dated March 9, 1885, in reply to letter of relator's attorneys of March 6, 1885.

Said letters filed in evidence by relator, marked " R " and " S."

Respondent's Objections to the Admission of Relator's Evidence. Filed March 13, 1885.

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY *vs.* ALLEN JUMEL, Auditor.	No. 10679. Civil District Court, Division A.

Defendant, O. B. Steele, auditor, by the attorney general, objects and excepts to the evidence offered by relator as follows:

18 Respondent objects to the addenda to the answer of C. H. P. Babcock to the 6th interrogatory, after the word " them " (in the fourth line from the end in the old printed record), on the ground that it is an indirect attempt to prove that all the conditions of the act 116 of 1869 had been fulfilled. The oral testimony is incompetent and insufficient to prove the fulfillment of said conditions. Relator is bound, estopped, and concluded by the judgment in the suit of the N. Y. Guar. & Ind. Co. *vs.* Board of Liquidation, No. 6939, supreme court of Louisiana, which judgment finally decided that said conditions were not fulfilled and complied with, and which judgment is *res adjudicata* against relator, the plaintiff in that suit. The testimony of the witness is incompetent and insufficient to prove payment of interest and recognition of the bonds. Relator has no right to prove payment of interest and recognition of the bonds, because the payment of the interest on and the recognition of an invalid bond would not and could not validate it, and the judgment in said former suit, which is *res adjudicata,* has finally decided that the bonds are and were invalid.

Respondent objects to the entire evidence of the witnesses Babcock and Marden, the certificate of the State treasurer of registration of the bonds (F), the requisition of the Governor (G), the detail of M. J. Thompson (H), the certificates of M. J. Thompson (I and K), the reports of M. J. Thompson (L and M), and the report of the board

of State engineers (N), on the ground that the only object and effect said evidence or any part of it is intended to have are to prove that the conditions of said act 116 were complied with and fulfilled and said bonds legally issued for a valid consideration, and constitute
legal and valid obligations of the State, incurred and issued
19 in conformity with the laws and constitutions of the State and
United States; all of which has been finally decided adversely to relator in the said suit of the board of liquidation, which judgment is *res adjudicata* against relator; that said evidence could not have that effect; but relator cannot make such proof by any evidence, because it is bound, estopped, and concluded by said final judgment against it.

Respondent objects to the statement (E) filed in the suit of State *ex rel.* Salomon & Simpson *vs.* James Graham, auditor, on the above grounds, and on the additional grounds that said statement does not show that relator's bonds are included therein. The object of that statement and suit was not to recognize and establish the validity of any of the bonds and obligations therein, but to show that the aggregate debt of the State, actual and contingent, exceeded the constitutional limit at the time of the passage of the act relied upon by Salomon & Simpson. No act of recognition by the then auditor and no such incidental recognition by a court could legalize or validate an invalid bond, and the State nor any of its officers or branches of government were not estopped thereby from questioning the validity of said bonds, which was successfully done in the said suit of relator against the board of liquidation.

If respondent's objections to any of said evidence are overruled and any of said evidence admitted notwithstanding said objections, such ruling is excepted to and the necessary bill of exception will be prepared and presented at the proper time.

(Signed) M. J. CUNNINGHAM,
Att'y General.

20 EXHIBIT "A."

Act of Incorporation of the New York Guaranty & Indemnity Company. Filed March 13, 1885.

An act to incorporate the New York Guaranty & Indemnity Company, passed April 13, 1864.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1ST. James H. Weeks, Thomas Reed, Francis A. Murdock, Joel Wolfe, J. Welsey Stark, Francis E. Pinto, and such other persons as may be hereafter associated with them, and their successors, are hereby constituted a body corporate, under the name of the New York Guaranty & Indemnity Company, to be located in the city of New York, and by that name shall have perpetual succession, and may sue or be sued in any court whatever, with powers and privileges as are hereinafter provided.

SECTION 2D. The capital stock of said company shall not exceed one million dollars, in shares of one hundred dollars each, but when one hundred thousand dollars shall have been actually subscribed and fifty thousand dollars paid in cash the said company may organize and proceed to business under this act.

SECTION 3D. The said company shall have power to guaranty the payment, punctual performance, and collection of promissory notes, bills of exchange, contracts, bonds, accounts, claims, rents, annuities, mortgages, choses in action, evidences of debt, and certificates of property or value, and the titles to property, real
21 or personal, upon such terms as may be established by the board of directors of said company; to receive upon storage, deposit, or otherwise merchandise, bullion, specie, plate, stocks, bonds, promissory notes, certificates and evidences of debt, contracts, or other property, and to take the management, custody, and charge of real and personal estate and property, and to advance moneys, securities, and credits upon any property, real or personal, on such terms as may be established by the directors of said company; but no rate of interest to exceed seven per cent. per annum shall be charged or received by said company in any transaction.

SECTION 4. The business and corporate powers of said company shall be exercised by a board of nine directors, to be chosen as hereinafter provided, who shall elect from their number a president, five of which directors shall constitute a quorum for the transaction of business.

SECTION 5TH. James H. Weeks, Francis A. Murdock, and Joel Wolfe shall be, and they are hereby, appointed commissioners to open books for subscription to the capital stock of said company, at such time and place as they or a majority of them shall deem proper and for such amounts as in their judgment the business of the company may require, but for no less amount of subscription than one hundred thousand dollars, as hereinbefore provided. The persons named in the first section of this act shall be directors of said company for one year after the passage of this act and until others shall be elected in their stead. The remaining directors for the
22 same period shall be elected by a majority in interest of the stockholders voting at an election to be held, under the inspection of said commissioners, within twenty days from the closing of the subscription called for by them, and all the directors must be stockholders in said company.

SECTION 6. It shall be lawful for said company to lease, purchase, hold, and convey all such real or personal estate as may be necessary to carry on their business, as well as such real or personal estate as they may deem it necessary to acquire in the enforcement of settlement of any claim or demand arising out of their business transactions, and to sell or exchange the same for other property as they may determine that the interests of the company require; and the said company are hereby authorized to make, execute, and issue in the transaction of their business all necessary receipts, certificates, and contracts, which receipts, certificates, and contracts shall bear the impress or stamp of the seal of the company, and shall be signed by the president and countersigned by the secretary or treasurer thereof.

SECTION 7. It shall be lawful for said company to sell at public auction or private sale, as may be specified in any contract between the parties, all property of what kind soever mentioned in or affected by such contract after two months shall have elapsed from the time of the maturity of any obligation under such contract (or immediately upon the discovery of any fraud, misrepresentation, or
23 concealment in regard to the ownership — character of the
property mentioned in or affected by such contract), and reimburse themselves out of the avails of such sale for the moneys due them, with the interest, costs, and charges: Provided, however, That nothing in this section contained shall be construed to prevent the said company from making any such sale at such time and in such manner as may be provided for in any contract or agreement made by any person or persons with the said company.

SECTION 8. In case any property deposited with the said company upon which any advance shall have been made by them shall, before the maturity of the contract — or make good the deficiency caused by such decrease in value from the price originally fixed, said company may give notice in writing to the owner of such property or his agent to perform the conditions of the contract or make good the deficiency caused by such decrease in value within thirty days, and in default thereof may sell and dispose of such property at public sale, and out of the proceeds thereof may retain the amount due them under the contract, together with the costs, charges, and expenses; but nothing in this act contained shall be held or construed to limit or affect the liability or obligation of the corporation hereby created, as the same is fixed by the common law or by statute, any further than the same is limited or affected by the express terms of the contract in this section mentioned.

24 SECTION 9. The stockholders of this company incorporated under this act shall be severally and individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company until the whole amount of capital stock fixed and limited by such company shall have been paid in and a certificate thereof shall have been made and recorded in the clerk's office of the county where the said company shall have their place of business; and the corporation hereby created shall be subject to the provisions of titles three and four, chapter eighteen, part first, of the Revised Statutes.

SECTION 10. The stock of said company shall be transferable only on the books of the company.

SECTION 11. This act shall take effect immediately.

STATE OF NEW YORK,
OFFICE OF THE SECRETARY OF STATE.

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom, and of the whole of said original law.

Given under my hand and seal of office, at the city of Albany, this 15th day of April, in the year one thousand eight hundred
[L. S.] and sixty-four.

CHAUNCY M. DEPEW,
Secretary of State.

25 An act to amend the charter of the New York Guaranty and Indemnity Company, passed February 10, 1865, three-fifths being present.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1ST. Section four of the act entitled "An act to incorporate the New York Guaranty and Indemnity Company," passed April 13th, 1864, is hereby amended so as to read as follows:

SECTION 4. The business and corporate powers of said company shall be exercised by a board of directors, consisting of such number of persons—not less than nine and not exceeding twenty-one—as may be prescribed by the by-laws, to be elected annually by a majority in interest of the stockholders voting at an election to be held at such time and place as may be prescribed by the by-laws of said company, and it shall be lawful for the said company, by a vote of two-thirds of said board of directors, with the consent of three-fourths of the stockholders, to permit dealers with the company to participate in the profits of the business of the company on such terms as may be prescribed by the board of directors, and also to provide for the issue of scrip for such profits, and how far such scrip shall be liable for losses to be sustained by said company, and in what manner such scrip shall be redeemed and paid off: Provided, That no dividend or payment by said company to or on account of such scrip shall be made so as to impair the cash capital of
26 the said company.

SECTION 2. It shall be lawful for said company to increase the amount of its capital stock in the manner provided in and by sections twenty, twenty-one, and twenty-two of the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17th, 1848.

SECTION 3. This act shall take effect immediately.

STATE OF NEW YORK,
OFFICE OF THE SECRETARY OF STATE.

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

Given under my hand and seal of office, at the city of
[L. S.] Albany, this tenth day of February, in the year one thousand eight hundred and sixty-five.

CHAUNCEY M. DEPEW,
Secretary of State.

Chapter 827.

An act to authorize the New York Guaranty & Indemnity Company to accept and execute certain trusts, passed April 29, 1871.

The people of the State of New York, represented in senate and assembly, do enact as follows:

27 SECTION 1. The New York Guaranty & Indemnity Company is hereby authorized and empowered to accept and execute any trust created by mortgage made by any railroad or other corporation to secure its bonds or other obligations lawfully made or issued, and appointing such company trustee and to act as trustee in respect to all matters embraced in such trust.

SECTION 2. This act shall take effect immediately.

EXHIBIT "B." Offered in evidence by relator. Filed March 13, 1885.

List of bonds of the State of Louisiana issued to the Mississippi & Mexican Gulf Ship Canal Company and held by the New York Guaranty & Indemnity Company, described in the annexed petition.

Nos. one to fifty, both inclusive	50
" 66 to 90	25
" 111 to 120	10
" 142 to 161	20
" 166 to 175	10
" 192 to 199	8
" 200 to 230	31
" 231 to 240	10
" 241 to 267	27
" 297 to 300	4
" 306 to 321	16
" 326 to 329	4
" 362 to 395	34
" 430	1
Total number of bonds	250

28 DOCUMENT "D."—Offered in evidence by plaintiff. Filed March 13, 1885.

Commission.

Fifth District Court for the Parish of Orleans.

No. 8317.

State of Louisiana to any Louisiana commissioner in the State of New York, Greeting:

Know ye that all [we], reposing confidence in your prudence and fidelity, do by these presents give unto you authority diligently to examine all witnesses whatever, as well on the part of the plaintiff as of the defendant, in a certain suit now pending in the fifth district court for the parish of Orleans, wherein New York Guaranty & Indemnity Co. is plaintiff and the State of La. is defendant.

Witness-, Charles H. P. Babcock, John W. Warden.

Therefore we desire you that at certain times and places, by you to be appointed for that purpose, you cause the said witnesses to come before you; that you then and there examine them apart upon their respective corporal oaths, first taken before you upon the Holy Evangelists; that you reduce their examinations to writing and cause the witnesses to sign their names, and when you shall have so taken them that you send the same, with this commission, closed up under your seal, to use in one [our] fifth district court, in the city of New Orleans, without delay.

Witness the Honorable Walter H. Rogers, judge of our
29 said court, this eighth day of November, in the year of our
Lord one thousand eight hundred and seventy-seven, and
in the one hundred and second year of the Independence of the United States.

[SEAL.] (Signed) PAUL T. ABADIE,
Deputy Clerk.

Interrogatories.

NEW YORK GUARANTY & INDEMNITY COMPANY
vs.
BOARD OF LIQUIDATION.
} 5th Dist. Court.
No. 8317.

Interrogatories to be propounded to Chas. H. P. Babcock and John W. Marden, residing in the city of New York, — New York, the answers to which will be used in evidence on the part of plaintiff on the trial of the above cause.

Int. 1st. Are you acquainted with the plaintiff in the above suit or with the affairs or business of the plaintiff with the Mississippi — Mexican Gulf Ship Canal Co. of Louisiana? If yes, state how and when you first became acquainted with them.

Int. 2d. What is your occupation, profession, or employment, and how long have you followed such occupation or employment?

Int. 3d. Do you know anything of any advances or loans made by the plaintiff to the Mississippi and Mexican Gulf Ship Canal Company of the State of Louisiana? If yea, state fully and particularly all you know in relation thereto, especially the amount or amounts so advanced or loaned, with whom same was negotiated
and paid, when said transaction took place and where; give
30 the dates and amounts of each and every amount advanced
by plaintiff to said company.

Int. 4th. Was any written obligation or contract entered into between plaintiff and said company? If yea, annex them to your answer. Should you be unable to secure the originals, annex sworn copies of the same to your answers, and state whether the signatures to the originals are genuine, and state also how you know the fact.

Int. 5. Are the original obligations or contracts the same that were originally given on receipt of the money advanced? If not, state how they came to be changed, by whom the original obligations were given, and to whom the plaintiff paid the money; when and how the said original obligations came to be delivered up, and on [all] the facts and circumstances in relation to the same, as well as the reasons thereof.

6th Int. State any and all other facts or matters within your knowledge in relation to the subject upon which you have been interrogated above, particularly who first applied to the plaintiff for the loan and offered the securities, what representations were made by them to plaintiff, and what were the reasons that interested plaintiff to accept the bonds as securities and grant the loan—all in the same manner and as fully as if particularly interrogated in relation thereto.

(Signed) KENNARD, HOWE & PRENTISS AND
EDW. PHILLIPS, *Att'ys.*

Affidavit Annexed.

STATE OF LOUISIANA, *Parish of Orleans:*

31 The undersigned, being duly sworn, says he is attorney-at-law of the plaintiff — is absent from the State; that the testimony sought to be obtained is material and necessary to enable plaintiff to make out his case.

(Signed) EDW. PHILLIPS.

Sworn to and subscribed before me on this 8th November, 1877.

[SEAL.] (Signed) PAUL T. ABADIE,
Deputy Clerk.

Waiver to Cross-Interrogatories.

Cross-examination waived.

(Signed) H. N. OGDEN,
Att'y General.

Deposition of Chas. H. P. Babcock.

Depositions of witnesses produced, sworn, and examined, by virtue of the annexed commission, on the 19th day of November, A. D. 1877, in the city of New York, before me, Moses B. Mackay, a commissioner of the State of Louisiana within and for the city and State of New York to take depositions, &c., in a certain cause now pending in the fifth district court for the parish of Orleans, State of Louisiana, holding sessions in and for said parish, wherein the New York Guaranty & Indemnity Company is plaintiff and the Board of Liquidation of the State of Louisiana is defendant.

Charles H. P. Babcock, being produced and sworn, answers as follows to the interrogatories propounded to him in this cause:

32 First. To the first interrogatory he answers: I am acquainted with the plaintiff and with its affairs and business with the Mississippi and Mexican Gulf Ship Canal Company of Louisiana. I became so acquainted with them in the summer of 1871. I was then, and had for more than two years before that time been, vice-president of plaintiff, and as vice-president had dealings with the Mississippi and Mexican Gulf Ship Canal Company in connection with the making of advances in cash to said company on the security of Louisiana State bonds and the stock of the company.

Second. To the second interrogatory he answers: I am still vice-president of the plaintiff, and am also now secretary of the Central Trust Company of New York, which latter office I have held since August, 1875.

Third. To the third interrogatory he answers: I know of advances and loans made by the plaintiff to the Mississippi and Mexican Gulf Ship Canal Company of the State of Louisiana. The plaintiff, at the request and on the application of Cyrus Bussy, treasurer of said Mississippi and Mexican Gulf Ship Canal Company, made at the plaintiff's office, in the city of New York, in July, 1871, agreed to advance and did advance to said company two hundred thousand dollars on the security of bonds of the State of Louisiana issued to the said company, of the par value of $250,000, to which was added an additional security — two hundred and fifty shares of one thousand dollars each, nominal value, of the capital stock of said
33 company. The bonds and stock were offered by Mr. Bussy as security for the advances requested by him in behalf of said company, and the said advances were made by the plaintiff on the faith of said bonds, the stock being of small value. The money was paid by plaintiff to said treasurer by plaintiff's check drawn, as directed by said treasurer, on the Bank of America, in the city of New York, all of which were paid in due course of presentation. The date and amount of each and every amount advanced to said company were as follows:

July 29th, 1871	$26,000
" 31st, "	10,000
August 1st, "	96,000
August 3d, "	60,000

amounting, with commissions deducted as agreed upon at the time, to $200,000.

Fourth. To the fourth interrogatory he answers: Within obligation and contracts were entered into between plaintiff and said company. They were the usual agreements taken by the plaintiff in all cases of advances made by it upon securities pledged by the borrower, and were signed by Cyrus Bussy, treasurer of the Mississippi and Mexican Gulf Ship Canal Company. They were signed by him in plaintiff's office and in my presence, at the time the money was advanced. It was understood and agreed by Mr. Bussy at the time with the plaintiff that agreements to the same effect would, as soon as possible, be executed in New Orleans by the president of the company and sent to the plaintiff in New York and substi-
34 tuted for those signed by Mr. Bussy. This was done, and
when the agreements signed by the president and Mr. Bussy, with the seal of the company attached, were received those signed by Mr. Bussy alone were given up. The original agreements, signed by Mr. Noyes as president, were in my possession, as vice-president of plaintiff, until they were annexed by me to my deposition in the suit of the plaintiff against The Mississippi and Mexican Gulf Ship Canal Company, taken in this city in 1874. I have not seen them since. I annex hereto true copies of said agreements, marked "A" and "B." The signature to the original signature of Mr. Noyes and Mr. Bussey—with the former's signature I am familiar, as signed to the certificates of stock of the company, and Mr. Bussy's was appended in my presence before the agreements were sent to New Orleans for completion.

Fifth. To the fifth interrogatory he answers: As already stated in my answer to the fourth interrogatory, the original obligations were given by Mr. Bussy as treasurer — were afterwards exchanged for agreements signed by both the president and treasurer. The first agreements were taken at the time the advances were made, with the express understanding that agreements signed by both the president and treasurer, authenticated by the seal of the company, should be substituted for them, and this was done. The money was paid, on the order of Mr. Bussy as treasurer, on the faith of this promise, which was performed.

Sixth. To the sixth interrogatory he answers: The loan was applied for by Mr. Bussy, as treasurer of the Mississippi and Mexican Gulf Ship Canal Company, and he offered the securities
35 specified in my previous answer, stating and representing that
the bonds of the State of Louisiana were a perfect security for the loan, and that the stock of the company had a prospective value, but the stock was regarded by the officers of plaintiff as only a makeweight.

In taking the bonds the plaintiff relied on the recitals printed in the bonds and the act of the Legislature of Louisiana printed on the back of them. Plaintiff never knew or had any means of ascertaining whether or not there existed any infirmity, informality, or illegality in them. They relied upon the fact that the conditions of the act authorizing their issue had been fulfilled, and that the State in paying interest on them had recognized them as valid obligations.

(Signed) C. H. P. BABCOCK.

Taken, subscribed, and sworn to, this 14th day of November, A. D. 1877, before me, the said commissioner.

[SEAL.] (Signed) MOSES B. MACKAY,
Louisiana Commissioner in the City of New York.

Deposition of John W. Marden.

And also JOHN W. MARDEN, being produced and sworn, answers as follows to the interrogatories propounded to him in this case:

First. To the first interrogatory he answers: I am [was] employed by plaintiff as accountant from February, 1866, until July, 36 1875; had an intimate knowledge of their affairs during those years; knew the said company in connection with the advances made to it by plaintiff.

Second. To the second interrogatory he answers: I am an accountant, and have been for twenty years.

Third. To the third interrogatory he answers: I do. On or about the 29th of July, 1871, the said company negotiated with the plaintiff an advance of $100,000; also, about August 1, 1871, another advance of $100,000. Each of said advances were secured by hypothecation of $125,000 of bonds of the State of Louisiana, and one hundred and twenty-five shares of the stock of said company (Mississippi and Mexican Gulf Ship Canal Company), of $1,000, par value, each share. There was to be a commission of four per cent. deducted from principal. The balance was paid by plaintiff to Cyrus Bussy, treasurer of said company—$26,000 July 29, 1871; $10,000 July 29, 1871; $96,000 August 1, 1871; $60,000 August 3, 1871. These transactions took place at office of the company in this city (plaintiff company).

Fourth. To the fourth interrogatory he answers: A separate contract was made at the time of each advance, signed by Mr. Bussy, treasurer, and afterwards exchanged for a contract of like date and character, signed by Mr. Noyes as president and Mr. Bussy as treasurer of said canal company, with the seal of the canal company on each contract. I have not the originals. Two copies are annexed to the depositions of Charles H. P. Babcock in this case, taken before you this day, marked A and B. The signatures to the orig- 37 inals were genuine, I believe, having compared them on certificates of stock known to be genuine.

Fifth. To the fifth interrogatory he answers: No. The originals were subsequently exchanged for agreements of a like tenor and date, signed by the president, J. O. Noyes, and treasurer, Cyrus Bussy, of said canal company, having the seal affixed on each. The change was to be made in this way when loan was made. The money was paid to said Cyrus Bussy, treasurer, who signed the original agreements.

Sixth. To the sixth interrogatory he answers: I have answered, as fully as I can, all the particulars required in this interrogatory.

(Signed) JOHN W. MARDEN.

Taken, subscribed, and sworn to, this 14th day of November, A. D. 1877, before me, the said commissioner.

(Signed) MOSES B. MACKAY,
Louisiana Commissioner in the City of New York.

Copies of agreements, marked "A and B," annexed to deposition of Charles H. P. Babcock (see originals annexed to document "M," at page 63 *et seq.*).

Commissioner's Certificate.

STATE OF NEW YORK,
City and County of New York, } *ss:*

I, Moses B. Mackay, a commissioner of the State of Louisiana, residing in the city of New York, to take depositions, &c., do hereby certify that Charles H. P. Babcock and John W. Marden, the deponents, were by me severally sworn to declare the truth on the
38 questions put to them in the same; that the interrogatories were produced to them and their answers thereto taken in writing by me and subscribed by them separately in my presence on the day and at the place in that behalf first aforesaid.

In witness whereof I have hereunto subscribed my name and affixed my seal of office this 14th day of November, 1877.

[SEAL.] (Signed) MOSES B. MACKAY,
Commissioner.

Commissioner's fees, $15.60, paid by plaintiff.

(Signed) MOSES B. MACKAY,
Commissioner.

DOCUMENT "M."—Affidavit of Charles H. P. Babcock, with original agreements B & C, offered in evidence by plaintiff and filed 17 December, 1877.

Fifth District Court of the Parish of Orleans, State of Louisiana.

NEW YORK GUARANTY & INDEMNITY COMPANY
vs.
BOARD OF LIQUIDATION OF THE STATE OF LOUISIANA.

CITY AND COUNTY OF NEW YORK, *ss:*

Charles H. P. Babcock, of said city, being duly sworn, deposes and — that annexed hereto are the original agreements or contracts re-

ferred to in his deposition and made in this action, in the city of
New York, on the 14th day of November, 1877, after the deposition
had been completed and the commission fully executed, for
39 which reason they were not annexed to deponent's deposition,
and are herewith returned to plaintiff's attorneys in
New Orleans.

(Signed) C. H. P. BABCOCK.

Taken, subscribed, and sworn to on this 15th day of November, A. D. 1877, before me in the city of New York.

(Signed) MOSES B. MACKAY,
Louisiana Commissioner in the City of New York
to Take Affidavits, &c., 231 *Broadway.*

Agreement or Contract Marked "B," Annexed to Affidavit.

Commission to maturity paid in advance, B, $100,000.

NEW YORK, 29 *July*, 1871.

Having confided to the management, custody, and charge of the New York Guaranty and Indemnity Company the following-described property belonging to us, viz., one hundred twenty-five State Louisiana $\frac{73}{100}$ per cent. bonds, $1,000 ea.; one hundred twenty-five shares stock Mississippi & Mexican Gulf Ship Canal Company; par value, $1,000 per share; and that company having advanced to us upon the same the sum of one hundred thousand dollars, we do, in consideration thereof, hereby agree with the said company to refund said advance, with interest at the rate of seven per cent. per annum, within six months from the date
hereof, and that for such advance and interest, together with
40 the commissions and charges hereinafter mentioned, as for all
other sums due or owing to the said company from us, the
said company shall have a lien prior to all other claims upon the said property and the proceeds thereof; that the said property has been confided to the said company subject to the conditions printed on the other side and which form a part of the agreement, and that the commissions of said company upon a sale thereof shall be five per cent. upon its gross proceeds; but if no such sale shall be made by said company, and the advances shall be refunded and the property withdrawn from its custody, the compensation of the said company for all management and charge of said property whilst in its custody shall be four per cent. upon the amount of such advance over and above all disbursements made by the said company on account of the said property, which, in any event, are to be paid.

[SEAL.] (Signed) JAMES O. NOYES,
President Mississippi & Mexican Gulf Ship Canal Company.

(On margin:) New York Guaranty and Indemnity Co.
(Signed) CYRUS BUSSY,
Treas. M. & M. Gulf Ship Canal Co.

[5-cent rev. stamp.]

Conditions referred to in the instrument on the other side:

1. The New York Guaranty and Indemnity Company shall not be liable for any loss or injury resulting from depreciation, or from any other cause than the gross negligence of the company or its agents, which may happen to the property mentioned in the instrument on the other side whilst in its custody.

41 2. At or any time after the expiration of the period fixed for the payment of the advance, if it remain unpaid, the company may, in its discretion or in the discretion of its president, sell the property at public or private sale, without notice to the owner (if sold at public auction the company may become the purchaser), and receive its proceeds, which are to be applied, in the first place, to the payment in full of whatever may then be due the company upon it. Until such sale shall be made and collected or the advance paid, interest and a *pro rata* commission shall be charged.

3. In case of a deficiency of such proceeds it is to be made good by the party receiving the advance, upon demand and immediately after such sale, and if there be a surplus it is to be immediately accounted for and paid over to the party signing this contract or order.

4. If, at any time before the period fixed for the payment of the advance, the market value of the property should be so reduced as not to afford to the company at the time being a margin of security for the payment of its advance of at least twenty per cent., additional property to make up such margin shall, within two days after its being required, be deposited with the company; and if default be made in that respect the amount of such advance may immediately thereupon, at the option of its [the] company or of its president, become due and collectible as if the period for its limited payment had expired, and the company may immediately proceed as provided for in the second article.

42 5. In case of any fraud, misrepresentation, or concealment in regard to the ownership or character of the property or securities, the company is entitled, under section seven of its charter, to sell the property immediately to reimburse the advance, with interest, cost, and charges, and the owner will be held liable for any deficiency.

(Endorsements.)

This is the agreement referred to by me in my deposition as marked "B."

(Signed) C. H. P. BABCOCK.
(Signed) J. W. MARDEN.
(Signed) MOSES B. MACKAY,
Commissioner.

Filed Nov. 27, '75.

(Signed) J. J. HANSOM,
Deputy Clerk.

Agreement or Contract Marked "C," Annexed to Affidavit.

Commission to maturity in advance, "C," $100,000.

New York, 1 *August*, 1871.

Having confided to the management, custody, and charge of the New York Guaranty and Indemnity Company the following-described property belonging to us, viz., one hundred twenty-five thousand dollars bonds — the State of Louisiana; one hundred twenty-five shares stock Mississippi & Mexican Gulf Canal Co., par value $1,000 per share, and that company having advanced us upon the same the sum of one hundred thousand dollars, we do, in consideration thereof, hereby agree with the said company to refund said advance, with interest at the rate of seven per cent. per
43 annum, within six months from the date hereof, and that
for such advance and interest, together with the commission and charges hereinafter mentioned, as well as for all other sums due and owing or to become due or owing to the said company from us, the said company shall have a lien prior to all other claims upon the said property and the proceeds thereof; that the said property has been confided to the said company subject to the conditions printed on the other side and which form a part of this agreement, and that the commissions of the company upon a sale thereof shall be five per cent. upon its gross proceeds; but if no such sale shall be made by the said company and the advances shall be refunded and the property withdrawn from its custody, the compensation of the said company for all management and charge of the said property whilst in its custody shall be four per cent. upon the amount of such advance over and above all disbursements made by the said company on account of the said property, which, in any event, are to be paid.

[SEAL.] MISSISSIPPI & MEXICAN GULF SHIP CANAL COMPANY,
(Signed) By JAMES O. NOYES, *President.*
(Signed) CYRUS BUSSY, *Treasurer.*

[5-cent int. rev. stamp.]

(On margin p. 89:) New York Guaranty and Indemnity Company.

Conditions referred to in the instrument on the other side:

1. The New York Guaranty & Indemnity Company shall not be liable for any loss or injury resulting from depreciation, or from any other cause than the gross negligence of the company or its
44 agents, which may happen to the property mentioned in the
instrument on the other side whilst in its custody.

2. At or at any time after the expiration of the period fixed for the payment of the advance, if it remain unpaid, the company may, in its discretion or in the discretion of its president, sell the

property at public or at private sale, without notice to the owner (if sold at public auction the company may become the purchaser), and receive its proceeds, which are to be applied, in the first place, to the payment in full of whatever may then be due to the company upon it.

Until such sale shall be made and collected or the advance paid, interest and a *pro rata* commission shall be charged.

3. In case of a deficiency of such proceeds it is to be made good by the party receiving the advance upon demand and immediately after such sale, and if there be a surplus it is to be immediately accounted for and paid over to the party signing this contract or order.

4. If, at any time before the period fixed for the payment of the advance, the market value of the property should be so reduced as not to afford to the company at the time being a margin of security for the payment of its advance of at least twenty per cent., additional property to make up such margin shall, within two days after its being required, be deposited with the company; and if default be made in that respect the amount of such advance may immediately thereupon, at the option of its [the] company or its president, become due and collectible as if the period for its limited payment had expired, and the company may immediately proceed as provided in the second article.

45 5. In case of any fraud, misrepresentation, or concealment in regard to the ownership or character of the property or securities, the company is entitled, under section seven of its charter, to sell the property immediately to reimburse the advance, with interests, costs, and charges, and the owner will be held liable for any deficiency.

(Endorsements.)

This is the agreement referred to by me in my deposition as marked "C."

(Signed) C. H. P. BABCOCK.
" J. W. MARDEN.
" MOSES B. MACKAY,
Commissioner.

46 EXHIBIT "E." Offered in evidence by relator. Filed March 13, 1885.

Statement of Auditor Graham, marked C, copied at page 65 of the record No. 3358 of the supreme court, in the suit entitled State of Louisiana *ex rel.* Solomon & Simpson *versus* James Graham, State auditor, offered in evidence by plaintiff 1st December, 1877.

DOCUMENT C.—Filed March 15, 1871.

State debt, computed up to 31st day of December, 1867.

Existing debt:		
Total amount State bonds, as per annual report of 1870		$22,560,233 00
Outstanding auditor's warrants issued between the 1st April and 31st December, 1870	$1,300,311 81	
Outstanding certificates of indebtedness issued between the 1st April and 31st December, 1870	293,655 63	
Outstanding certificates of indebtedness issued under act 5 of 1866	33,630 00	
Balance due on vacant estates	13,529 58	
Due purchasers of lands for redemption of same	15,159 77	
Due the General Government under the deposit act	479,919 14	
Due on proceeds of slaves sold out at depot	3,781 60	
Amount due the free schools accumulant fund, the same having been borrowed from said fund under act No. 45 of 1863	200,000 00	
Amount due the public land fund under act No. 47 of 1863	117,275 77	
Deposited by syndic of creditors of William Kenner & Co.	2,791 29	
	$2,460,054 59	2,460,054 50
		$25,020,287 59
Deposited by creditors of Morgan, Dorsey & Co.		1,446 81
Total		$25,021,734 40
47 Brought over		25,021,734 40
Accruing debt:		
Remaining bonds of the State to be issued in favor of the Mississippi & Mexican Gulf Ship Canal Co., $474,000, having been issued — act 116 of 1869 ($126,000)	$126,000 00	
Remaining bonds of the State to be issued to the North Louisiana & Texas R. R., the entire length of said road being about 190 miles, at $6,000 per mile, and 91 miles thereof having been already paid for and included in the bonded debt (act No. 108 of 1868)	594,000 00	
Bonds of the New Orleans & Mobile & Chattanooga R. R. Co., the payment of which the State guarantees under the first section of act No. 26 of 1869, the entire length of the road being 226 miles, at $12,500 per mile	2,825,000 00	
Also under act 31 of 1870, fifth clause of the fourth section thereof, the entire length of the road being about 200 miles, at $12,500 per mile	2,500,000 00	
Bonds of the State to be issued to the said railroad in accordance with the provisions of the 7th section of act 31 of 1870	3,000,000 00	
Bonds of the New Orleans, Baton Rouge & Vicksburg R. R. Co., guaranteed by the State to an amount not exceeding $12,500 per mile of said road and its branches, as per act No. 143 of 1869 (estimated number of miles, 500)	6,250,000 00	
Obligation to subscribe for 1,000 shares of the stock of the Mississippi Valley Navigation Co. of South & West, as per act No. 84 of 1870	100,000 00	
Total		$40,416,734 40

48 Brought over $40,416,734 40

Recapitulation.

State bonds	$22,560,233 00	
Auditor's warrants and certificates	1,593,967 44	
Miscellaneous debts	867,533 96	
		40,416,734 40
Amount brought forward		$40,416,734 40
Amount of outstanding warrants issued during the months of January and February, 1871		458,730 57
Amount of certificates of indebtedness issued during the months of January and February, 1871		93,443 57
		$40,968,908 54

State of Louisiana, Auditor's Office,
New Orleans, *March* 15, 1877.

I hereby certify the above and foregoing to be a true and correct statement of the debt of the State on the first day of March, 1871.

[SEAL.] (Signed) JAMES GRAHAM, *Auditor.*

Printed auditor's report referred to in above statement to be used in original. See agreement at page 17.

49 Exhibit "F." Offered in evidence by plaintiff. Filed March 13, 1885.

Document N.—Certificate of Ante Dubuclet, State treasurer. Offered in evidence by plaintiff and filed first December, 1877.

State of Louisiana, Treasurer's Office,
New Orleans, *Oct.* 30, 1875.

This is to certify that the following-described bonds, issued to the Mississippi and Mexican Gulf Ship Canal Company under act No. 116 of 1869, were duly registered in the bond book of the State treasury, to wit:

474 bonds of the State of 1,000 dollars each, Nos. 2 to 300, in., Nos. 306 to 480, in., payable 30 years after date, with 7.3 — interest per annum, payable semi-annually in the city of New York or New Orleans.

Bonds Nos. 1, 301, 302, 203, 204, and 305, description same as above, were not registered in the books of the State treasury, never having been presented for that purpose, although they were regularly issued and appear to be duly registered in the books of the auditor.

(Signed) ANTE DUBUCLET,
State Treasurer.

EXHIBIT "G." Offered in evidence by plaintiff. Filed March 13, 1885.

DOCUMENT D.—Requisition of Gov. Warmoth on president board of public works.

50 D. Copy.

STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,
NEW ORLEANS, *April* 19, 1869.

Gen. Martin Flood, president board of public works.

SIR: I have the honor to request you to report to me for the purpose of making a survey of the work done on the Mexican Gulf canal in accordance with the provisions of act 116 of the Legislature of 1869, approved March 8, 1869.

(Signed) H. C. WARMOTH,
Governor of Louisiana.

OCTOBER 21ST, 1875.

I certify that the above is a true copy of the original on file in this office.

(Signed) K. BAL. THOMPSON,
Sect'y Board of State Engineers.

EXHIBIT "H." Offered in evidence by plaintiff. Filed March 3, 1885.

DOCUMENT E.—Detail of Gen. M. Jeff. Thompson, engineer of board of public works, to make an examination of work done.

E. Copy.

APRIL 20, 1869.

Gen. M. Jeff. Thompson, engineer board of public works.

SIR: You will without delay report to Hon. H. C. Warmoth, Gov. of La., for the purpose of making an examination and survey on work on the Mexican Gulf canal in accordance with provisions of act No. 116 of the Legislature of 1869, approved March 8, 1869.

51 Very respectfully,
(Signed) R. D. MITCHELL, *Secretary.*

OCTOBER 21, 1875.

I certify that the above is a true copy from the letter book in this office.

(Signed) K. BAL. THOMPSON,
Secretary Board of State Engineers.

EXHIBIT "I." Offered in evidence by plaintiff. Filed March 13, 1885.

DOCUMENT F.—Certificate of Gen. M. Jeff. Thompson, dated 23d April, 1869.

F. Copy.

STATE OF LOUISIANA,
ENGINEER'S OFFICE, BOARD OF PUBLIC WORKS,
NEW ORLEANS, LA., *April 23d*, 1869.

To his excellency H. C. Warmoth, Governor of Louisiana, New Orleans.

GOVERNOR: In pursuance of your order directing me to survey and examine the condition of the Mississippi and Mexican Gulf canal, in conformity with act 116 of the Legislature of Louisiana, approved March 8, 1869, I have the honor to report and certify that I have personally visited and inspected the Bayou Dupres and the work done and being done by the Mississippi and Mexican Gulf Canal Company, and that I found in Bayou Dupres, from Lake Borgne and in the direction of the Mississippi river, more than three consecutive miles of channel with a width of more than
52 seventy feet on the surface, more than forty feet on the bottom, and with more than ten feet in depth—in fact, with sufficient capacity to accommodate any vessel now plying on the waters of Lake Borgne or Lake Pontchartrain—and the company still at work, with machinery and manual labor, straightening and widening the bayou; and I hereby certify that the Mississippi and Mexican Gulf Canal Company are entitled to such issue of bonds as said act No. 116 authorizes for three consecutive miles, of the dimensions specified, from Lake Borgne towards the Mississippi river.

I have the honor to be, most respectfully, your obedient servant,

(Signed) M. JEFF. THOMPSON,
Acting Chief Engineer, Board of Public Works.

OCTOBER 21, 1875.

I certify that the above is a true copy of the record on file in this office.

(Signed) K. BAL. THOMPSON,
Secretary Board of State Engineers.

Exhibit "K." Offered in evidence by plaintiff. Filed March 13, 1885.

Document G.—Certificate of Gen. M. Jeff. Thompson, chief engineer of State, dated June 16, 1870.

G. Copy.

Office Board of Public Works,
Chief Engineer's Office,
New Orleans, La., *June* 16, 1870.

To his excellency H. C. Warmoth, Governor of Louisiana.

Governor: In accordance with your instructions I have
53 examined and measured the work done by the Mississippi &
Mexican Gulf Canal Company on their canal since my report to your excellency on April 23d, 1869; and I hereby certify that they have completed their canal to a point four miles from the Martello tower, on Lake Borgne, and that the same is done in accordance with the specification enumerated in act No. 116, approved March 8, 1869. Therefore said company are entitled to the issue of State bonds for the fourth mile, as provided in said act, in addition to the three miles embraced in my report of April 23d, 1886.

Permit me to add that their preparations exceed anything of the kind ever seen in this State, and that we may anticipate an early completion of this important work.

I have the honor to be, your obedient servant,

(Signed) M. JEFF. THOMPSON,
Sec'ty Board of State Engineers.

Exhibit "L." Offered in evidence by plaintiff. Filed March 13, 1885.

Document H.—Report of M. Jeff. Thompson, chief engineer, dated 31st December, 1870.

H. Extract.

His excellency the Governor directed me to examine the Mississippi & Mexican Gulf canal and report the progress of the work to
him. I did so on the 23d of April and on the sixteenth of June,
and am glad to say that I found the work being pushed
54 with a vigor that was commendable, and so reported.

The most powerful dredge-boats and derricks in the Union are employed, and it is astonishing to see the amount of work performed by them.

At an early date the canal will be near enough the Mississippi river to commence business, and early next summer I hope to see the lock completed.

I certify that the above is a true copy from page 65 of the chief engineer's report to the board of public works, and from thence to the General Assembly of Louisiana, session of 1871; said report is dated December 31st, 1870, and can be found in this office.

(Signed) K. BAL. THOMPSON,
Secretary of Board of Engineers.

October 23, 1875.

EXHIBIT "M." Offered in evidence by plaintiff. Filed March 13, 1885.

DOCUMENT I.—Report of M. Jeff. Thompson, chief State engineer, dated 19th June, 1872.

I. Copy.

JUNE 19TH, 1872.

Dr. J. O. Noyes, Miss. & Mex. Gulf Canal Co.

DEAR SIR: In accordance with your request for an abridged statement of the condition of the Mississippi & Mexican Gulf canal,
I report that on April 23d, 1869, I examined that work
55 officially and gave a certificate for three consecutive miles of
more than 70 feet surface, 40 feet on bottom and 10 feet of depth, and on June 15, 1870, I again examined the work and gave a certificate for another mile of similar work, and since that time I have several times visited the work unofficially and found the work pushed up to the lock-pit, which was partially dug, and the canal from the four-mile post to the lock-pit more than half width.

That this work could be now speedily finished, and that it will be a great channel of commerce and profitable if properly managed there can be no doubt.

Yours most respectfully,
(Signed) M. JEFF. THOMPSON,
Chief State Engineers.

OCTOBER 21ST, 1875.

I certify that the above is a true copy from the letter book in this office.

(Signed) K. BAL. THOMPSON,
Sec't. Board of State Engineers.

EXHIBIT "N." Offered in evidence by plaintiff. Filed March 23, 1885.

DOCUMENT J.—Report of board of State engineers to the General Assembly, dated 31st December, 1872.

J. Lake Borgne canal.

There has been no active prosecution of this important work since our last report. At that time the dredges had all been removed

to the city of New Orleans to work upon the drainage canals
56 under the contract between the Lake Borgne Canal Company
with the city of New Orleans. This canal now stands much more than half finished, and the only costly work will be the building of the lock, which, at the reduced size authorized by act No. 28, approved April 22, 1872, will not be a great undertaking.

Since the building of the Mobile and New Orleans railroad much of the anticipated profit and business of this canal has been diverted, yet, if completed at reduced depth, the lockage, compared with original plans, it can but be profitable to the stockholders and useful to the State and the commerce of the Mississippi river with the Gulf coast. The State has a large interest in the successful completion of this work, which will enable the company to meet their obligations to the State and eventually retire the bonds issued to them, as contemplated by law.

We therefore recommend that such modifications be made in the laws authorizing this work as will enable the company to complete this canal conformably with present necessities and the conditions of our city and State finances.

OCTOBER 22, 1875.

I certify that the above is a true extract from the report of the board of State engineers to the General Assembly of Louisiana, session of 1873; report dated December 31, 1872, pages 6 and 7.

(Signed) K. BAL. THOMPSON,
Secretary of Board of State Engineers.

57 EXHIBIT "O." Offered in evidence by plaintiff. Filed March 13, 1885.

J. H. Kennard. W. W. Howe. S. S. Prentiss.
Law office of Kennard, Howe & Prentiss, No. 3½ Carondelet street

(Registered.) NEW ORLEANS, *December* 15, 1883.

Hon. Allen Jumel, auditor of public accounts.

DEAR SIR: Our client, the New York Guaranty & Indemnity Company of the City of New York, is the *bona fide* owner, before maturity, of 250 bonds issued by the State of Louisiana under the act 116 of 1869.

The arrears of interest unpaid on the bonds issued under that act and of deposits required to be made largely exceed the sum of one hundred thousand dollars, and we submit that it is your legal duty to estimate and levy the special tax provided for by section 7 of the act.

It is hardly necessary for us to suggest that the provisions of section 7 constitute a contract with our clients which the State cannot by any action impair.

We therefore have the honor to make a demand that you will estimate and collect the tax so provided, and in case of your refusal it will become our duty to take all legal steps in the premises.

An early answer will oblige,

Yours respectfully,
(Signed) KENNARD, HOWE & PRENTISS.

58 EXHIBIT "P." Offered in evidence by plaintiff. Filed March 13, 1885.

STATE *ex rel* NEW YORK GUARANTY AND INDEMNITY COMPANY *vs.* ALLEN JUMEL—O. B. STEELE, Substituted. } No. 10679. Civil District Court.

Testimony of W. W. Howe for Relator, Taken by Consent.

Affidavit waived.

I am one of relator's attorneys, and sent to the auditor, at this date, the demand marked O. He answered by a letter, refusing to comply with the demand and referring to the funding acts. The letter has been lost and cannot be found, after diligent search, but such were its contents. I also saw him personally after such demand and before filing this suit, and he reiterated such refusal.

(Signed) W. W. HOWE.

EXHIBIT "R." Offered in evidence by plaintiff. Filed March 13, 1885.

J. H. Kennard. W. W. Howe. S. S. Prentiss.

Law office of Kennard, Howe & Prentiss, No. 3½ Carondelet street.

NEW ORLEANS, *March* 6, 1885.

Mr. James Campbell, office State treasurer, Baton Rouge, La.

DEAR SIR: In a case here the attorney general and ourselves have agreed to enquire from you whether the Mississippi & Mexican Gulf Ship Canal Company ever complied with the obligations
59 to deposit certain moneys in the State treasury, under sections 4 and 6 of the act 116 of 1869, and if it made any such deposits, when it ceased to make them.

A reference to the law will show that the company was to make under these sections certain deposits for interest, &c.

Our impression is that if any were made at all there were never after, say, 1872.

Will you kindly let us know as soon as you conveniently can, and oblige,

Yours truly,
(Signed) KENNARD, HOWE & PRENTISS.

EXHIBIT "S." Offered in evidence by plaintiff. Filed March 13, 1885.

STATE OF LOUISIANA, TREASURER'S OFFICE,
BATON ROUGE, LA., *March* 9, 1885.

Messrs. Kennard, Howe & Prentiss, attorneys-at-law, New Orleans

SIRS: Yours of the 6th inst. at hand, and in reply will state that the only amounts the Miss. & Mexican Gulf Ship Canal Co. ever deposited into the State treasury in accordance with act 116 of 1869 are as follows:

M'ch 31, 1870.	Auditor's order,	#883	255 50
Aug. 29, 1870.	" "	2776	255 50
M'ch 31, 1871.	" "	830	255 50
Sept. 1, 1871.	" "	3078	255 50

Since then to the present time it ceased to make any payment or complied with its obligations.

Respectfully,
(Signed) JAMES CAMPBELL.

60 *Petition, List of Bonds, and Judgment. Offered in Evidence by Respondent. Filed March* 13, 1885.

GUARANTY COMPANY
vs. No. 8317.
BOARD OF LIQUIDATION.

Petition. Filed 17 May, 1877.

To the Honorable W. H. Rogers, judge of the fifth district court for the parish of Orleans:

The petition of the New York Guaranty & Indemnity Company, a corporation and body politic duly incorporated by and under the laws of the State of New York, domiciled in the city and State of New York, and of whose charter a copy is hereto annexed, marked "A," respectfully represents—

That your petitioners are the *bona fide* owners and holders of two hundred and fifty bonds issued by the State of Louisiana to the Mississippi & Mexican Gulf Ship Canal Company under the provisions of act No. 116 of 1869, entitled An act providing State aid in the construction of the Mississippi & Mexican Gulf Ship Canal and for the issue of State bonds therefor, approved March 8, 1869, each of the said bonds being for the sum of $1,000 and having fifty-one coupons attached to each—of thirty-six $\frac{50}{100}$ dollars each—*attached to each* and every one of said bonds, payable on the first days of March and September of each year until the maturity of said bonds.

61 All of said bonds were duly signed by the Governor of the State and countersigned by the secretary of state and sealed with the seal of the State, and were duly registered in the books of the treasurer of the State, and in all other respects were in exact conformity with the provisions of said act, and said bonds were made transferable and negotiable by the endorsement of the president and treasurer of the board of directors of said company, as provided by said act.

That by the terms of their charter your petitioners were and are authorized to advance money upon any real or personal property on such terms as may be established by the directors of said company, but no rate of interest exceeding seven per cent. is allowed to be charged.

That in the regular course of their legal and legitimate business and for a full and valid consideration your petitioners became the legal holders and owners of said two hundred and fifty bonds, and they are desirous of having them exchanged for the consolidated bonds of the State, in accordance with the act No. 3, approved January 4, 1874; that under the provisions of act No. 11, approved May 17, 1875, the board of liquidation is prohibited from funding said bonds or exchanging them for the consolidated bonds of the State, under the provisions of the said act No. 11 of 1875, until said bonds shall first, by final decree of the supreme court of the State of Louisiana, have been declared legal and valid obligations against the State of Louisiana, and that the same were issued in strict conformity to law, and not in violation of the constitution of the State or of the United States, and for a valid consideration.

62 Now, your petitioner represents that the said bonds are legal and valid obligations against the State, and that the same were issued in strict conformity to law, and not in violation of the constitution of the State or of the United States, and for a valid consideration.

That said bonds have been repeatedly and constantly recognized as such by the executive, legislative, and judicial branches of the government, and appropriations have been regularly made for payment of the interest on the same, and said bonds have, for the benefit of the State, been declared a part of the debt of the State in the case of State *vs.* Graham, No. 3358 of the docket of the supreme court.

Petitioners represent that they annex hereto a list of the numbers of each of the said bonds, which is made part of this petition.

Wherefore your petitioners pray that the matter may be duly and legally investigated by the court, and that after due proceedings had according to law that said bonds be decreed to have been issued in strict conformity to law, and not in violation of the constitution of this State or of the United States, and that they be declared legal and valid obligations against the State of Louisiana and issued for a valid consideration.

Further pray that said board of liquidation may be cited to defend this suit, and that the State of Louisiana be also cited and served with a copy hereof, through its attorney general, that he may conduct this case to its final termination, as required by law.

63 Further pray for all such further, general, and special relief as justice, equity, and the nature of the case may require.

(Signed) EDWARD PHILIPS,
KENNARD, HOWE & PRENTISS,
Pl'ff's Att'ys.

List of Bonds.

List of bonds of the State of Louisiana issued to the Mississippi & Mexican Gulf Ship Canal Company and held by the New York Guaranty & Indemnity Company, described in the annexed petition.

Nos. one to fifty, both inclusive	50
" 66 to 90, both inclusive	25
" 111 to 120, both inclusive	10
" 142 to 161, both inclusive	20
" 166 to 175, both inclusive	10
" 192 to 199, both inclusive	8
" 200 to 230, both inclusive	31
" 231 to 240, both inclusive	10
" 241 to 267, both inclusive	27
" 297 to 300, both inclusive	4
" 306 to 321, both inclusive	16
" 326 to 329, both inclusive	4
" 372 to 395, both inclusive	34
" 430	1
Total amount of bonds	250

Judgment.

Fifth District Court, &c.

NEW YORK GUARANTY & INDEMNITY CO.
vs. No. 8317.
THE BOARD OF LIQUIDATION.

In this case, for the reasons orally assigned in open court
64 this day—

It is ordered, adjudged, and decreed that there be judgment in favor of defendants, with costs.

Judgment rendered January 15, 1878.
Judgment signed January 19, 1878.
(Signed) W. H. ROGERS, *Judge.*

Opinion and decree of the supreme court of Louisiana in case No. 8317, fifth district court, offered in evidence by respondent and filed March 13, 1885.

Opinion of the Court.

THE NEW YORK GUARANTY & INDEMNITY COMPANY
vs No. 6939.
THE BOARD OF LIQUIDATION, &c.

Mr. Justice EGAN:

The plaintiff brought this suit under act No. 11 of the Legislature of Louisiana, approved May 17, 1875, to procure the final decree of this court declaring certain bonds issued originally to the Mississippi & Mexican Gulf Ship Canal Company, under act 116 of 1869, " legal and valid obligations of the State; that they were issued in strict conformity to law and not in violation of the constitution of 65 this State or of the United States, and for a valid consideration," as a prerequisite to and with the view of having them funded or exchanged for consolidated bonds of the State under act No. 3 of 1874.

The petition contains all the necessary allegations and sets forth that said bonds have been repeatedly and constantly recognized as valid by the executive, legislative, and judicial branches of the Government, and more especially at the instance of the State in the case of the State *vs.* Graham, auditor. A., p. —.

There was an exception to the petition on grounds which were permitted in the court below to be cured, so far as they could be, by the filing of an amended petition. The answer is a general denial.

The act under which the bonds purport to have been issued provided in [for] the issuance, in aid of the canal company, of bonds of the State not to exceed six hundred thousand dollars, on certain conditions therein named, viz:

When the said Mississippi & Gulf Ship Canal Company, beginning at the mouth of Bayou Dupres, on the shore of Lake Borgne, shall have completed the proposed canal for a distance of one mile to the depth of ten feet at ordinary stage of water, with a width of seventy feet at the top and forty feet at the bottom, either by excavating on a new line or by widening, straightening, and deepening the channel of Bayou Dupres, then, upon the certificate of the State engineer or of any one of the engineers of the board of public works selected by the Governor of the State that the said work has been done as above provided, the Governor of this State is hereby 66 authorized and directed to issue the bonds of the State to the amount of one hundred and twenty thousand dollars, according to the provisions of this act; that when the said company shall have completed the second, third, and fourth miles of said work to the width and depth of the first mile, so as to form a continuous canal, then, upon the certificates of the engineer, as before provided, that the second, third, and fourth miles are so completed, each certificate being given on the completion of each of said miles, the Governor is hereby authorized to issue to said company, under the provisions of this act, on the completion of each of the said three miles, the bonds of the State to the amount of one hundred and twenty thousand dollars; that when said canal company shall have entirely completed the said canal to the width and depth above specified, with a good and substantial lock at least three hundred feet long and eighty feet wide, so as to afford navigation at ordinary stage of water in Lake Borgne from the Mississippi river to Lake Borgne, then, upon the certificate of the engineer, as above provided, that the work is so far finished, the Governor of this State is hereby authorized and directed to issue the bonds of the State to the amount of one hundred and twenty thousand dollars ($120,000), making a total of six hundred thousand dollars ($600,000).

This act was approved on the 8 of March, 1869. There were but two issues of bonds—one in June, 1869, for the first three miles indiscriminately, and the other in June, 1870, for the fourth mile.

The bonds were all required to be dated the 1st of March,
67 1869, were for one thousand dollars each, with coupons attached bearing interest at $7\frac{3}{10}$ per cent. per annum, payable semi-annually, and were payable in thirty years.

There is nothing in the evidence to show for what part of the work the bonds held by the plaintiff—250 in number—were issued, except that they were of the first. It seems that the interest was paid for a time, and then the payments stopped.

These bonds were among those which were prescribed by act No. 11, before mentioned, and their funding was prohibited without first obtaining the decree now sought. They are the same which were before us at the last term on an application for mandamus to compel their funding without first obtaining the decree required by act No. 11.

They were issued upon the certificate of an engineer of the board of public works that the work was completed according to the statute.

It is now contended that this certificate is conclusive of that fact, and that evidence that the work was not so completed and that the conditions of the law were not complied with was improperly received in the court below. The authorities cited on behalf of the plaintiff, and other adjudications of this court not cited, sustain this position so far as relates to ordinary actions; and were this one for the recovery on the bonds in question, we should not hesitate to rule accordingly. There are, however, several considerations going to show that the principle involved does not apply to this peculiar statutory action required by the amendment to the funding
68 bill, which was in itself nothing more than a tender by the State of a new contract to its creditors on certain conditions as to the bonds held by plaintiffs and other proscribed or suspected bonds, a compliance with which was made a prerequisite to their sharing the benefits of the funding act. The plaintiff has been careful not merely to offer evidence of the prerequired certificate of the engineer, but has gone further and offered the report of that officer and of the board of engineers to the Legislature to the same effect, and also the auditor's and treasurer's report that these bonds were outstanding, and that all but one of them (No. 1) had been registered in the treasurer's books under the statute. The Legislature then knew full well when it passed act No. 11 of 1875, requiring, as a prerequisite to their being funded, that the bonds of the class and issue held by the plaintiff should be ascertained not only to have been issued in conformity to law, and not contrary to the constitution of the State or of the United States, but also for a valid consideration; that the required certificate of the engineer had been given before the issuance of the bonds.

They also knew that the bonds had been negotiated and had passed into the hands of third persons. How idle, then, would it have been to have required this court to find the several facts re-

quired by the act if either the possession of the bonds by third persons, *bona fide* holders, or their issuance after and upon the authority of the engineer's certificate was to shut off enquiry into their consideration of their issuance in conformity to law—*i. e.*, that
69 the conditions of the act had been complied with. Again, the counsel for the plaintiff has taken pains to inform us why these bonds were made a subject of suspicion and denied the privilege of being funded, as other recognized obligations of the State, without the previous judicial enquiry provided for by act No. 11. We are thus informed, as well by the legislative journel in the record, that it was, at least in part, because of the State auditor having preferred against the Governor the charge of having issued to the Mississippi and Mexican Gulf Ship Canal Company bonds to the amount of $354,000 in violation of law, said bonds having been issued by him before the law had been complied with, the work never having been done as required by law, and that the State was thus defrauded to that amount.

Whether this be the origin of the suspicion attached to these particular bonds or not, it is quite evident that the Legislature had some good reason for including both them and other issues among the proscribed class which the board were positively forbidden to fund without the previous judicial ascertainment of the fact that they had been issued in strict conformity to law and for a valid consideration. It is part of the history of the times that the credit of the State was so freely and so improperly used and abused during what is styled the reconstruction era that it was not only natural but wise that the courts should not only be authorized but required to go beyond the mere surface, the mere compliance with the forms of statutes, and enquire into the real facts of the case, as was the evident legislative intent that they should do under act No. 11 of
70 1875.

We have uniformly held, in all the cases which have come before us under that act, that the ordinary rules of evidence in regard to negotiable paper passing before maturity into the hands of even innocent third persons for value did not preclude or excuse us from going into the question of consideration or any other enquiry made necessary by the act, no more than, we think, that did the Legislature intend us to stop an enquiry into the validity of the bonds in question and the lawfulness of their issue and consideration merely at and because of the fact, well known to them already, that the certificate of the engineer, the officer pointed out by act 116 of 1869, had been obtained and given before the bonds were issued. No judicial enquiry would have been necessary and none would have been ordered had that been the limit. The plaintiffs are not here asserting in an ordinary action upon the bonds the rights to recover their amounts. They are asking to remove the cloud of suspicion which attaches to their bonds in order that they may accept the offer of consolidated bonds made by the State to its creditors. This they cannot do except by complying with the conditions and making the proof required by the act, which for this purpose knows no distinction of persons or holders and which commands and requires full enquiry into the original legality and valid consideration of the bonds. Indeed, plaintiff's counsel, while excepting to the evidence on this subject offered by the defence, have themselves gone behind the engineer's certificate and the action of the other State authorities not only by cross-examining the witnesses for the defence, but by offering on behalf of the 71 plaintiff the testimony of several witnesses, including the engineer himself, to prove affirmatively compliance with the statute and the character and extent of the work done. They cannot under the law object to the evidence being considered. In regard to the recognition by State officials of the bonds in question, it need only be remarked that the validity, legality, or consideration of the bonds could not be affected by any such acts of recognition.

No such power existed in any officer or branch of the government, not even the Legislature. If void, the bonds were not susceptible of ratification, and the constitution of 1868, article 110, expressly provides that "no retroactive law shall be passed," and, if so, certainly not any action by any State officer.

The same may be said of the alleged judicial recognition in proceedings to which the plaintiffs were not parties. Leaving these matters out of view, then, which can have no effect in determining the present issues, the plaintiffs' evidence consists, so far as is necessary to discuss it, aside from the bonds themselves, in the detail and certificate of the engineer, which conforms to the statute, in an unauthorized report of that officer to the president of the company, in his official report, and in the testimony of witnesses, of whom he is the first. He states that the bayou had been for a long time almost as large as required by law, that the points were cut off so as to make it navigable, and that it had the requisite dimensions for four miles.

On cross-examination he states that he first went down to 72 examine the canal on April 20, 1869, a little over one month after the passage of the act authorizing the issue of the bonds; that they had been at work about twenty days with one dredge-boat; that he went with Dr. Noyes, president of the company, and his wife. When asked "Who was with you when you made the first survey," he answers, "I took men from among the employés to row the boat." When asked if there were but two in the skiff when he made the survey he answers, "Two were rowing." When asked who cast the rod he answers, "I steered and sounded, and steered with the same pole." He further states that he has no field-notes of the soundings; that whenever there was any question about the depth he kept them; but they were not produced, and, as we have seen, he had just denied having any. He says he was engaged four or five hours in examining the three miles; that at any point which called his attention as being narrow he stretched his line across; that he made, he supposes, fifteen or twenty cross-sections. In reply to the question "When you made soundings with the pole did you take a note of the depth," he answers, "Yes, sir; when it was not over ten feet."

Q. You were holding the pole? You had to take a note of the depth?

A. Only when I touched the bottom.
Q. Did you touch any place where it was much under ten feet?
A. Close to the bank, I did sometimes.
Q. Was the canal ten feet in depth all the way?
A. Yes, sir. In some places near the bank it would be shallower.
73 Q. Did you make a report to the Governor?
A. I took it to him myself.
Q. Did that report embrace the whole three miles?
A. Yes, sir.
Q. Whereupon the Governor issued these bonds?
A. I suppose so.
Q. Was not there a natural bayou, with natural width and depth?
A. Yes, sir; we had to cut down trees and cut off points.
Q. It possessed the width by cutting down trees and cutting off the points?
A. Yes, sir; pulling up of stumps.
Q. What is the length of Bayou Dupres?
A. A little over three miles.
Q. Where did they commence digging the main channel?
A. Across at the head of Bayou Dupres; at the edge of the timber.
Q. What distance did they cut the timber?
A. The map will show.
Q. You have stated that you trimmed the trees and trimmed off the points?
A. Yes, sir.
Q. Was that the condition when you went down there?
A. Yes, sir.
Q. Who was present at the time?
A. Dr. Noyes was there. (Dr. Noyes was president of the canal company.)
74 Q. What is the entire length of the canal?
A. I forget; I think a little over six miles between the lock-pit and the end.

(Other witnesses fix the length about 7 miles.)

Q. Can you tell the exact time when the company collapsed—when it ceased to act?
A. Soon after the passage of that bill.

(Meaning, no doubt, act No. 30 of 1871, to provide for the drainage of New Orleans.)

Q. Were the dredge-boats taken away?
A. The dredge-boats were taken away before the lock-pit was completed. The company ceased to operate about (that) time.
Q. What is the date?
A. I don't remember.
Q. Can you tell by reference to your books when the report was made?

A. No, sir; they were at work last June 16, 1870.

Q. You gave certificates for the four miles?

A. Yes, sir.

Q. Did that fourth mile extend into the timber?

A. Yes, sir; nearly up the river. They had cut one-half of the width; then cut the other half.

Q. When did you measure that?

A. June 16, 1870.

Q. Who assisted you the last mile in the measurement of it?

A. I forgot who it was; there were plenty of men there.

Q. Did that last mile have the requisite depth?

75 A. Yes, sir.

Q. And the requisite width?

A. Yes, sir.

Q. Your actual measurement?

A. Yes, sir.

This witness was the State engineer, who seems also to have identified himself with the canal company from his frequent use of the pronoun "we" in speaking of the work. He was the principal witness for the plaintiff. The foregoing extracts from his testimony will show how much importance is to be attached to it and to the accuracy and carefulness of his survey and to his certificate (based on such an examination) that the work has been done according to the requirements of the act, and that the company was entitled to four hundred and eighty thousand dollars of the bonds of the State, which were accordingly issued and of which the two hundred and fifty held by the plaintiff form a part. An excursion on a summer's day in company with the president and his wife; an examination and soundings with a pole, with which he also steered, lasting only four or five hours and extending over three miles of bayou or canal; the possession or production of no notes of the soundings and measurements; the absence of any assistants or of the use of any proper and usual appliances for the measurements, as shown by the testimony of the engineer himself, are the best commentary upon the value to be attached to his official report, upon which the plaintiffs mainly rest their case. This report, made under such circumstances and within a little more than one month after the
76 passage of the act, found [formed] the basis on which bonds of the State were issued to the canal company, to the amount of three hundred and sixty thousand dollars, being at the rate of $120,000 per mile for the first three miles. The additional issue for the fourth mile of $120,000 was based upon another report of the engineer, which may be judged of by the first and by the light of other evidence in the case. The next witness for the plaintiff is Adley, who commanded one of the dredge-boats which was built near the river end of the canal and used on that part of it, for which the bonds were not issued and which it is not pretended was ever finished according to the requirements of the act. He says that the river end was his section; that he did no work on the first four miles; was engineer on the best of the dredge-boats which passed

through the bayou, draining [drawing] six feet, and his boat was thirty feet wide. He never made any measurements of width or depth, but by the length of the crane of the dredge-boat thinks the bayou was sixty feet wide. He was afterwards for a time dredging at the entrance of the bayou to the lake; dug 13 feet in depth and cut the channel 35 feet wide; could not tell the width of the cut at the point; went through there with his boat. The boats were all sent away to New Orleans.

Cornelius Riordan, plaintiff's witness, says he was employed in cutting the fourth mile, the depth attained at which was 12 to 14 feet at ordinary stage of water.

Cross-examined:

He cannot say of his own knowledge that the fourth mile
77 would average ten feet deep all the way through. He judged
by the instructions, which were to dig 11 feet, by the water-mark on the dipper handle, and by what the men said. He cannot say of his own knowledge; never went through the whole of the four miles to measure it. The whole work was expensive and well done, so far as done; saw a large schooner drawing seven feet and a good-sized steamboat go through.

Cross-examined:

Cannot say that the schooner drew 7 feet at the time. General Cyrus Bussey, another witness for plaintiff, was a director and treasurer of the company; negotiated a loan of $200,000 with plaintiff, giving the State bonds as a collateral. Owing to subsequent depreciation and inability of the company to meet its obligations, plaintiffs bought in the bonds.

This witness testifies at length, but in general terms, as to the amount expended on the work; states that there was a canal to within a short distance of the river, which was and is open to trade, and was used by vessels. He does not say of what size or character. An expensive lock-pit was dug near the river, but never finished, nor was the work otherwise. He knows some work was done on the bayou before the first issue of bonds; gives no detail as to the work or dimensions; says all the money obtained through the State bonds and over $100,000 of private capital was expended on the work. He subsequently says $500,000 was expended on the work, but does not inform us where the money came from, except the $200,000 from plaintiffs and the $100,000 private capital. Although, as we have said, a director and treasurer also from a very early day, he was un-
able to give any answer to the question, how much stock was
78 subscribed and money paid. He says he does not know; that
the capital stock was fixed at $2,000,000. He subsequently informs us that the bonds and credit of the State became so depressed and the company was called to make good the margins, which it was impossible for it to do, so the bonds were sold to pay the debt already contracted. We are also informed by him and

other witnesses that the company bought and built five dredge-boats, at a cost of quite or near $100,000, and two or more derricks, worth from $3,000 to $4,000 each. Another witness states that $16,000 was expended in expropriating bonds. Bussey swears that all the money, and more than a hundred thousand dollars private capital in addition, was expended on the canal. He does not know how much money was expended on the first, second, third, or fourth mile of the canal; that the length of the bayou and canal is seven miles altogether, inclusive of the lock of the canal at the river; seven miles altogether.

The following is a part of his examination:

Q. Do you know how much work was done on the first mile of that canal?

A. No, sir; I have no idea how much. I only know that I went down there on an excursion with some other gentlemen and saw a dredge-boat working there before the first bonds were issued.

Q. Whereabouts did you go?

A. Not far from the lake.

Q. You don't know whether it was the first mile or the second mile?

A. I should think it was within a mile of the lake. I rode
79 down in a skiff.

Q. What capital had the company before the bonds were issued?

A. I can't tell you anything about that.

Q. Did it have any capital?

A. Capital stock of the company was fixed at two millions of dollars.

(By the COURT:)

Q. I ask you, was that capital subscribed and paid up, or any part of it?

A. I don't know how much money was received.

(By the COURT:)

Q. Tell us how much private capital was expended on the first four miles.

A. I could not tell you how much capital was expended on the first four miles.

The same witness says he was a director of the said canal company from a short time after the first issue of bonds; he cannot state the exact time; that considerable sums were spent on the first three miles of the canal, but he does not know how much. He knows there was a number of places where the bayou had to be deepened and widened and trees and underbush cut off to make the canal navigable. He admits that the dredge-boats of the company were purchased partly with money derived from the sale of bonds; the cost and value of these is shown to have been about $100,000; other witnesses place them and the costs of derricks considerably higher.

The same witnesses themselves state that more than five hun-
80 dred thousand dollars were spent on the canal, without the machinery, but he does not inform us from what source the money was obtained, other than the $192.000 from plaintiffs, after deducting commissions and the hundred thousand dollars of private capital previously spoken of by him. He further says that the dredge-boats bought for the canal were brought up here and used in the drainage of the city.

Several other witnesses made the same statement, and one says they are still somewhere in the city, in some of the canals. He says there was really and still is a canal to within a short distance of the river, so that vessels of considerable size could come up close to the river; that he saw vessels within a quarter of a mile of the river; that the canal was advertised as open to trade, and there was trade on it. He, however, does not give either the size or number of the vessels, which we are led —, from the testimony of other witnesses for the plaintiff and in the cause, were not either numerous or of the draft contemplated in the act. The testimony of this witness further, we think, sufficiently shows that the company originally expected the work to be done with the money or credit of the State, and that, in point of fact, although the capital stock was placed at 2,000,000 of dollars, very little, if any of it, was ever paid in. Under this state of facts there might be a very serious question whether there ever was any legal organization of the company under the charter. In answer to the question what caused the enterprise to fail, the same witness says: "The canal company met with great difficulties in the excavation of the canal in the upper end, towards the river. All the work was prolonged be-
81 yond the time of our estimates. Sunken roots and stumps would delay the dredge-boats for days at a time by causing breakages of machinery. The lock-pit was an enormous work, requiring the excavation of a large amount of earth, and in consequence of this great delay the company was carried into a time when the credit of the State was impaired by the frequent revolutions that had taken — in political matters, till the loans which the company had effected on the bonds were much greater than their market value. At one time those bonds were down, I think, as low as (25) twenty-five cents on the dollar. The company was called upon to make good the margins, which was an impossible thing for it to do, so the bonds were sold to pay the loans that had been contracted. By this time the Mobile & New Orleans railroad was constructed, and that, to a great extent, took the place which this canal was intended to fill, and it prevented private capitalists putting up money to complete it, as more than (½) half the capital put up by the State had been consumed, owing to the decline in the value of the bonds."

We think this record discloses another, and doubtless the most cogent, reason for abandoning the work—*i. e.*, the new privileges and contract obtained by the same company, by virtue of the drainage act, to which, from that time until they made a failure in that also, the canal company addressed itself.

The next witness for the plaintiff is Riorden, an engineer on one

of the dredge-boats employed in excavating the forth mile of the canal, who says they were instructed to dig 11 feet at low water; that at an ordinary stage of water the depth attained was
82 from 12 to 14 feet; that he has no doubt there [that] the depth of the 4th mile exceeded ten feet when the State engineer gave his certificate, in June, 1870.

On cross-examination, however, he says, in answer to the question:

Q. How do you know that the fourth mile was ten feet deep all the way through?

A. Instructions were to dig eleven feet. I knew depths by watermarks on the dipper handle of the dredge. I never went through the mile for the purpose of examining the depth. I judge by the general orders and by what I heard the men say, as they were employed. I cannot, of my own knowledge, say that the fourth mile was ten feet deep at every point. I can't swear, of my own knowledge, that there was an average depth of ten feet through the whole of the fourth mile.

In reference to a schooner drawing seven feet, which he had stated in chief he saw going through, he says, on cross-examination: " I do not say she was drawing seven feet at that time."

He does say, however, that vessels, the size of which he does not mention, can go through it from the river bank to Mobile, &c., and that he saw the Murty, a good-sized steamboat, going through, and that the works on the bayou and canal were expensive, and, so far as done, well done. This witness states that the canal was only dug forty feet wide in the fifth, sixth, and seventh miles, which, as well as the fourth, consisted of the part of the canal which was chiefly artificial piles, (which) were driven outside the mouth of the bayou, and some little dredging done. The piling was intended to protect the mouth of the bayou, and other
83 witnesses say extended out into the lake about 150 feet; one says 400 feet. It would be too tedious even to give the substance of all the testimony. Suffice it to say that none of the witnesses give so favorable an account for the plaintiff as those from whom we quoted. The most minute and circumstantial statement of the cost and character of the work is that of witness Merrill, who was superintendent of the canal company from the commencement, which he states was on the 5th of April, 1869, till they left there, in 1871, to do the drainage work of the city. He says the only work done on the first mile of the canal was dredging off one point about a mile from the mouth of the bayou, which had the requisite width and only its natural depth, but that at the time the bonds were issued, 23d April, 1869, there was not ten feet depth of water all the way in the bayou. He places the cost of work on the first mile at $1,000; says it was done in seven days with one dredge-boat and the five hands on it, without other assistance; that he employed fifteen or twenty negroes in cutting the overhanging branches of trees along the bayou, and used the dredge in taking stumps from

the bayou and clearing the second mile. This took ten days and cost about $1,000. This was all the work done on the second mile before the bonds were issued. The second mile had the necessary width and depth. The depth was the natural depth. They began work on the third mile by dredging through a lagoon. They made a cut through the soft mud of the required width and depth. The mud was lifted and thrown back into the lagoon. It was so soft it interfered with the work and filled in behind them as fast as
84 the dredge passed. This work occupied two weeks, and was done by the hands on the dredge-boat, without other assistance, and cost about $2,000. The third mile was not ten feet deep all the way when the engineer gave his certificate. There was fifty to $75,000 expended on the fourth mile. It was a lagoon 200 feet wide. The canal dug through it was 70 feet wide at the top, less 40 feet at the bottom. It was not ten feet deep all the way. They did their best to make a good channel there, but the mud would continue to fill in behind them, unless it was piled away in some other place. It should have been taken away and dumped somewhere out of the lagoon. They had a driver on the banks—referring, no doubt, to the derricks—to remove the mud, but this was not till a year afterwards. His statement of costs does not include that of the dredge-boats. They used the bayou to within four miles of the river and dug a canal the remaining distance. Small, light-draft boats, drawing four to five feet, but no more, run up and down the canal. This witness states the cost of excavating the canal, where the bayou is not used, at $150,000. He says they built other dredge-boats, and had for the entire work six altogether; 4 cost $20,000 each, one $12,000, and one $25,000, all of which were brought away from the canal to the city, where they commenced the drainage work. He says there is a bar at the mouth of the bayou, extending about 400 feet into the lake, upon which there was three feet of water at low water, when he came in with his dredge, and there is not more than six or seven feet of water in the lake; that it was no use to remove the bar and let the vessels in till the canal was
85 completed. It was intended only to let in the dredge-boats, and the plan was to remove the bar after the canal was done. Another witness, Gillespie, fully corroborates the statements of Merrill as to the character and intent of the work as to the first three miles, but says that he does not know its value. He commenced work the same time as Captain Merrill; was employed on the dredge as dipper-tender; continued through the first three miles, and was then sent to Pascagoula and had no more to do with the work.

A point was cut off to straighten the bayou, but the water was just as good before as after; was there all the time the work was going on on the first three miles. They had but one dredge on this part of the work. They were about one week in cutting off the point. He and Merrill both state the dredge could have been hired at $15.00 per day. It belonged to Mr. Noyes and had been used at Pascagoula. Witness had been working there under Captain Merrill and came from there to work with him on the canal. When witness left it was claimed that the first three miles were done.

Merrill again says there was about three miles of artificial canal cut from near the river in nearly a straight line; that piles were driven about 400 feet out into the lake to protect the entrance, and a cut of twenty feet wide and eight feet deep had been dug outside in the lake; that the average depth of Lake Borgne for navigable purposes changes with the wind; it is from six to nine feet deep in the summer. He says that the lock-pit was dug two hundred feet long by 150 feet wide and 12 feet deep. If it was completed
86 the canal would be useful for those of more than four feet
draft. The water is lower in winter than in summer, owing to the wind being from the north. It was impracticable for boats of ten feet draft to navigate the canal without also dredging the lake. This comprises the most important contemporaneous testimony. Some years after the work was abandoned three experts were sent down there to examine and report the condition of the canal and the amount of work done on it. This appointment was made in the mandamus case of the same plaintiffs, to which we have already alluded. It is objected that their report should not have been received by reason of their *ex parte* appointment. Under the facts presented in this record, we deem it a matter of but little importance whether the report is considered or rejected, as the substantial facts stated in it also appear from the oral testimony of one of the experts given on the trial and by a diagram of the survey, sworn to and filed in the record. The plaintiffs introduced two witnesses who accompanied the experts, both of whom corroborate their statement that they passed through the canal from the lock-pit to the lake, occupied considerable time in doing so, and made frequent soundings and measurements. The substance of the testimony of the two witnesses referred to is that there was evidence of considerable work having been done, and that they were surprised to find the canal in so good condition so long after the work had been abandoned, and that the examination was made entirely from the boat.

This was in December, when the water was lower than in
87 summer and than it had previously been. The experts were
Webster, Wood, and Heath, and they were also accompanied, as Webster testifies, by Rowland, a surveyor, whom they took with them to aid in measurements and in making an accurate examination. Webster states that they made an accurate and thorough examination; made some six hundred soundings and consumed an entire day in doing so; that the experts were unanimous in their report. He says their attention was called to the cut in the first mile, but they failed to see it; that the first mile from the lake was over 70 feet wide and ten feet deep; saw no indications of dirt being thrown on the bank in the first mile. They found a cut in the second mile 100 yards long, with a channel six feet deep on each side; nothing else in the second mile. From the second to the third mile, a point part of the way through the lagoon, the soundings were very irregular—eight feet the greatest and three feet the least. They discovered no evidence of work having been done on the third mile. In the fourth mile the soundings ranged from five to nine feet, averaging a little over six feet; saw no evidence of work on the

fourth mile. About $\frac{1}{8}$ of a mile from the end of the fourth and in the fifth mile dredging had been done for about 250 yards. About $\frac{3}{8}$ of a mile further on they came to a canal, which was about a mile long, in the fifth mile. The width of the canal from the 4 to $4\frac{1}{2}$ mile point is about 70 feet. The bayou has an average depth of six feet.

"We found the canal had been dug $2\frac{1}{2}$ miles to a point 200 yards from the Mississippi river; saw no evidence of a canal having
been dug between the points marked A and B on map filed,
88 which we understand to be the diagram prepared by the sur-
veyor, Rowland." They made their examination from the boat. The character of the country along the canal, particularly the lower end, is marshy prairie, with high weeds, which are burned every year. The only place they noticed any roots laid bare was in the canal, and did not notice any in the bayou. There were a few small trees growing on the bank in the upper portion of the fourth mile; noticed none at the mouth. Going down they took the soundings zigzag; coming back they took them in the center of the bayou. It had sufficient width the first two or three miles. (We understand the witness to mean surface width.) The depth was sufficient the first mile and a fraction of the second. The report of the experts is more detailed and minute, but substantially accords with the testimony of Webster. It contains the further statement that the tide rises and falls about one foot in calm weather, and that the water in the canal and bayou is much affected by the direction and force of the wind. We have been thus careful in reviewing the testimony because of the character and importance of the case and that it may speak for itself.

We will add that the State treasurer's certificate shows that 474 bonds only were registered in his office, in accordance with the requirements of act 116 of 1869, before mentioned—Nos. 1, 301, 302, 303, 304, 305 never having been registered or presented for registry, as appears by the auditor's books. The allegations of the amended
petition are that the bonds up to No. 360 were issued with refer-
89 ence to the first three miles from Lake Borgne, and those from
Nos. 361 to 480, inclusive, were issued with reference to the 4 miles from Lake Borgne. The bonds sought to be funded by plaintiff include No. (1) one, not registered as required by the act, and Nos. 362 to 395, both inclusive, and No. 430, being 35 bonds judicially admitted by the plaintiff to have been issued with reference to the fourth mile from Lake Borgne. In regard to these it will not be controverted that it is clear from the evidence, if we go behind the engineer's certificate, as we think the funding bill and amendments not only permit, but require us to do, as before said, in this peculiar statutory action, by which we are required to find and adjudge the existence of certain facts as a prerequisite to funding. It is, we say, clear that all the bonds issued for the fourth mile were issued not in accordance with but in violation of law. The same may be said of bond No. (1) one, in regard to which the express provision of the act was disregarded and not obeyed, which as much required the registry of the bonds in the books of the

treasurer of the State as that they be signed by the Governor, or dated or made payable in particular amounts or at stated time, or any other form or fact required to make them perfect and complete bonds of the State (see section second of act 116 of 1869). It is also clear and not controverted by any party to this proceeding, and fully shown by the evidence of the plaintiff company, there were but two issues of bonds—those for the first three miles indiscriminately, by
virtue of the engineer's certificate of April 23d, 1869, which
90 itself covers the first three miles from Lake Borgne, without
discrimination or distinction also, and the second issue, which was for the fourth mile, by virtue of the engineer's certificate of June 16, 1870. By recurring to the terms of the act already recited and in evidence it will be perceived that the — contemplated and required and it was the evident intent of the Legislature that the certificate of the engineer and the issue of bonds based upon it should be given and made for each successive mile of the contemplated work as it should be completed according to the requirements of the act. That it was a proper and necessary safeguard and a wise provision and precaution is made abundantly manifest by the facts developed in this record, even by the plaintiffs themselves and with reference to no other testimony than that of the engineer, upon which we have already commented. How much more, then, if we consider the testimony of all the witnesses as it is presented in the record of this case? Had this provision of the act, which looked to successive short and careful surveys and accurate and minute measurements and to equally cautious and successive issues of bonds, been obeyed, not only might the State but the plaintiffs have been spared the trouble of this litigation and the possibility of heavy loss or burthen as may be entailed upon the one or the other. We have seen that the best-informed contemporaneous witnesses, as well as those to a latter period, directly contradict the certificate of the engineer as to the first three miles; that his own testimony supports
it very unsatisfactorily, and that his certificate as to the fourth
91 mile could not have been correct unless it alone is to be be-
lieved against and above the overwhelming weight of other testimony. The inevitable conclusion is, then, that the certificates as given were not correct and ought not to have been given, and, if so, that the bonds based upon them should not have been issued, and were not issued in accordance with the terms and conditions and in the manner and amount fixed by the statute.

Who can say in regard to three hundred and sixty bonds, issued at the same time and based upon one common certificate, what part of the bonds were issued for the first mile and what part for the second and what part for the third mile? There is no evidence in this record to enable us to make this distinction. The bonds themselves do not enable us to do so, and officials who issued them do not seem to have made it. What greater right have the plaintiffs to claim that the 250 bonds now sought to be funded or one part of them should be preferred to the remaining 110 of the same issue, based upon the same certificate, held by others? The evidence is direct and positive that the 360 bonds for the first three miles were all

issued at the same time, while the old and well-recognized maxim of the law, "*falsus in uno, falsus in omnibus,*" may as well be opposed to the engineer's certificates as to any other former class of evidence. Again, the evidence is that the act authorizing the issuance of the bonds to the canal company was approved March 8th, 1869. The work was begun on the fifth of April, 1869. On the 19th of April the Governor made requisition for an engineer. He was de-
92 tailed to make the survey on the 20th of April, and made it the same day, and on the 23d of the same month and year—April, 1869—the work had progressed so far, according to the engineer's certificate, that the company was entitled to $860,000 of State bonds under the act. The rapidity with which this desirable end was thus attained at one leap, without even the formality of stopping at any intermediable point or sum, is the best commentary upon the manner and facility with which so large burthens were in those evil days sought to be imposed upon this State and people without adequate or any consideration; and whatever may be the current of decisions and the weight of authority as to the right of the State to tax its people for works of internal improvement, prosecuted and owned by private corporations, who will say that under the facts, as in the present instance, that power was in any proper sense exercised for the public benefit or that the public have been benefited? Again, as was said in the Lord Cecil case (29th A.), there is no evidence in this record that the mortgage in favor of the State required by the third section of act 116 of 1869 was ever executed or recorded as required by our code and constitution, and the security thus required was a most important consideration to the State, and its only security for the payment by the company of the amount of the bonds and interest and the performance of its obligations under the contract and the law embodying it. Of all these requirements and of all the provisions of the act the plaintiffs were affected with notice when they took the bonds, as the act was printed upon them. The law required
93 the endorsement of the bonds by the president and treasurer of the company for their transfer. If there was no legal organization there was neither president or treasurer, nor, if so, was there any judicial person, any corporate entity, in whose favor a legal issue of bonds under act 116 could be made. Whatever may be the real facts, so far as they appear in this record they would indicate that the amount of stock required by the charter was never subscribed or payment made on it. No attempts have been made by the plaintiffs to show such subscription or how or when an organization was effected. We heard of no law and have been referred to none which would authorize or permit the organization of a joint-stock company before the amount of capital stock fixed in the charter was subscribed, unless, as is not the case with the Mississippi & Mexican Gulf Ship Canal Company, the charter authorizes an organization upon the subscription or taking of some minimum or smaller sum.

The plaintiff's counsel has referred to an *obiter dictum* of this court in the mandamus case by the same plaintiffs in relation to the provision in the act for the redemption of the bonds issued under it, which, by the constitution, article III, is required to be made at the same time the issue or debt is authorized, and which shall be irrepealable till the principal and interest are fully paid. The provision made by act 116 of 1869 on this subject was certainly loose, and has proved to be very unsatisfactory and insufficient. We do not, however, consider it necessary to decide, — the present case, 94 whether it was or not sufficient compliance with article III of the constitution. The mandamus case, as is properly remarked by plaintiff's counsel, went off on a question of procedure, and the point was not there ruled.

On the whole case, we do not think that the plaintiff has established, as required by act No. 11 of 1875, amending the funding bill (and as it was incumbent upon it to do) that the bonds in question are legal and valid obligations of the State; that they were issued in strict conformity to law, and not in violation of the constitution of this State or of the United States, and for a valid consideration. So also thought the judge *a quo*, who gave judgment for the defendant, with cost.

That judgment was correct, and it is affirmed.

95 *Petition for Rehearing. Offered in Evidence by Respondent. Filed March* 13, 1885.

THE N. Y. GUARANTY & INDEMNITY COMPANY *vs.* THE BOARD OF LIQUIDATION. } Supreme Court of Louisiana. No. 6939.

Petition for Rehearing. Filed 30 *October*, 1878.

To the honorable the supreme court of Louisiana:

The petition of the plaintiff herein respectfully shows that there are errors to its prejudice in the opinion and decree of this honorable court lately rendered therein, and it prays for a rehearing according to law; and—

First. Petitioner avers and shows that the act No. 11 of 1875, extra session of the Legislature of Louisiana, as drawn in question, set forth, relied on, and construed in the said opinion and decree of your honors is, as thus construed, unconstitutional, null, and void, being in conflict with article first, section tenth, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligations of contracts.

The suit at bar is instituted under act No. 3 of 1874, commonly called the funding bill. The defendant is created by this act, and by this act alone is this action authorized.

By that act No. 55 of 1874, to which the attention of your honors is now specially called, all remedies of this petitioner and other bondholders are taken away, except these which existed 96 through the act No. 3 and the action thus given to compel a funding in new consolidated bonds.

Petitioner was thus left with one practical and present remedy only to fund its bonds by action or suit under said act No. 3 of 1874. It had a right to accept that situation and it did, provided always that its bonds should be so funded. It brought its suit under that act. It is met in the pleadings with a general denial only. In the argument and in the opinion of the court it is met with the act No. 11 of 1875, extra session, which, as construed by your honors, makes an illegal assault on the bonds held by petitioner, impairs their obligation, takes away the rights of petitioner, which had existed for years, as a *bona fide* holder of them, relieves the State of its own judicial admission in the case of State *vs.* Graham, and changes rules of evidence to the prejudice of plaintiff.

The bonds acquired by petitioner in 1871, the law of 1869 under which they were issued, and the several provisions of that law constitute contracts in favor of petitioner which could not be lawfully impaired by the State. If it be said that the acts Nos. 3 and 55 of 1874, above referred to, in view of which this suit was brought, also impair the obligations of said contracts, the reply is evident that petitioner may waive its objections to such impairment and submit to the funding regime, and petitioner has done this on condition that its bonds may be funded; but petitioner is not obliged to waive any other right. No earthly power can force it lawfully to any further concession.

97 Petitioner is willing to accept the pittance of 60 cents offered by the act No. 3 of 1874, and to ask for it by the suit provided in that act; but when your honors declare that even that pittance shall be refused because the act No. 11 of 1875, in the opinion of your honors, takes it away, then the act No 11 of 1875 takes away the last shred of remedy and right—strikes the *coup de grace* at the contracts of petitioner—and petitioner has a right to invoke and does invoke the Constitution of the United States, as cited above, with all the results implied in such a pleading.

Reference is here made to the late case, of Hall *vs.* Decuir (The Reporter, vol. 6, p. 420), where the Supreme Court of the U. S. has reversed the decree of the supreme court of Louisiana because the statute there in question, as construed by the State court, conflicted with the Constitution of the United States; and also to the cases Gelpke *vs.* Dubaquie, 1 Wall., 175, and Thomson *vs.* Lee Co., 3 Wall., 327.

Second. Petitioner submits that your honors have erred in ruling that testimony might be admitted to vary, contradict, or affect the certificates of the chief State engineer, upon which the bonds were issued. By the act of 1869 authorizing the bonds they were to be issued on these certificates, and for the payment of the principal and interest on the bonds so issued "the faith of the State is unconditionally pleaded [pledged] to the holder."

The bonds, which are in evidence, recite that they were issued according to the act, and the act is printed on their reverse.

98 The plaintiff, becoming holder in 1871, took them with the solemn assertions made by the proper officers who signed the bonds and the certificates on which these officers acted.

Moreover, there is in the pleadings no allegation of either error or fraud. By the law, as it existed in 1869 and 1871, the certificates were the evidence.

(Orleans Co. *vs.* Allard, 6 La., 491; Town of Coleman *vs.* Eaves, 2d Otto, 487.)

This dilemma is presented: Either the act No. 11 of 1875 is null and void, as set forth above, because it impairs the obligations of plaintiff's contract, acquired under the act 116 of 1869, including the right to safely — on said certificates as conclusive, or else it does not take away that right, and the certificates were and are conclusive.

Third. It is submitted that your honors have erred in ruling that the judicial admissions made in the case of the State *vs.* Graham, 23 A., 402, were not conclusive as to the validity of the bonds held by plaintiff. In that case the State intervened in her full capacity. Her right to do so was questioned, but it was sustained. (See opinion.) She was represented by the attorney general. To defeat the relator in that case—to save herself a large sum of money—she set up that her debt had reached a certain point, and that among its items were the very bonds in question in the case at bar; and in the opinion in her favor by this court these bonds are especially referred
to as a part of the valid existing debt of the State. This opin-
99 ion was delivered and published to the world in the early
part of 1871, before the plaintiff acquired the bonds, and
formed an additional element in the *bona fide* of its acquisition. Now, it is submitted that the State and its officers can never be heard in any court to say that the bonds are not valid.

Having defeated Solomon & Simpson by setting up these bonds as valid, she cannot now defeat the holders by saying they are invalid. On no principle of law, logic, or moral science can she be permitted to affirm their validity in court for her own purposes in 1871 and then deny it in 1878.

(State *vs.* Taylor, 28 A., 462.)

The plaintiff, who purchased after the decision in State *vs.* Graham, had a vested right in the estoppel thus created which the Legislature cannot take away. We submit that act No. 11 of 1875 does not take it away, but if it attempts to it is itself void.

Fourth. It is submitted that your honors have erred in holding that under the act 116 of 1869 it was necessary that each mile of the work should be measured by the State engineer at a different time and a separate certificate given for each mile and a separate issue of bonds made for each mile, as certified. The statute does not intend or [to] convey any such meaning.

The phrase "each certificate being given on the completion of each — said miles" is a provision in favor of the company, not a precaution in favor of the State. It was to enable the company to demand an issue of bonds for each mile as completed, and to
prevent any State officer from saying, "Yes, you are en-
100 titled to so many bonds for each mile, but you must wait till
they are all done." That the company chose to wait till three

miles were done, and then demand- the measurement of three miles continuously and the issue of bonds for three miles continuously, was no more illegal or irregular than for a landlord having a right to collect his rent month by month to wait and collect three instalments in one, nor, if your honors will permit the illustration, for a justice of this court to wait nine months and then collect three quarters' salary at one time. The salaries of judges are directed by law to be paid quarterly, on their own warrants. It would be a violation of law for the financial officers of the State to refuse to pay them in such quarterly instalments, but it would be no violation of law for a judge to wait a year, if he chose, and collect four quarters at once. A party in whose favor a right is created may waive it. There is no principle of *or* engineering or finance by which the measurement of a canal and the issue of bonds would be any better or worse whether three miles were measured continuously in April, May, and June. State officers are presumed to do their duty on one day as well as on another.

The attention of your honors is especially called to the fact that this point was not made against petitioner by the defendant nor its eminent counsel. It has never been argued in any way, and this fact alone would seem to entitle petitioner to a rehearing, for the right to be heard by counsel is a fundamental and sacred right.

Fifth. It is submitted that your honors have erred in con-
101 sidering and giving force to a report of experts, so called, and
to the testimony of Webster, which had been used on a former trial and which was received in the lower court subject to the same objection made to all testimony offered to contradict the certificate of the State engineer. The visits of Webster and his companions and their report were made in December, 1875. Nearly 7 years had elapsed since the work was done, in 1869, on which the bulk of the bonds were issued. Over five years and five months had elapsed since the completion of the fourth mile and the issue of the balance of the bonds. The canal ran through a swamp, a trembling prairie, and opened into a great tidal lake subject to terrific southeasterly and northeasterly gales. The same gigantic powers of tide and tornado which overwhelmed Proctorville some years ago, and which, in a similar situation, often overflows the rear of New Orleans, had been operating on this canal for nearly seven years. The diversion of trade, the financial pressure, the death of the chief projector of the canal, the transfer of the dredge-boats to New Orleans for drainage purposes, under the authority of the State herself, by act 30 of 1871, had delayed the completion of the canal and diminished, doubtless, the care taken of it by the company. Webster himself, after stating that there was a sufficient width for the first four miles, and in reply to a question by the defense which sought to create inference that a want of proper depth had always existed, testified:

"Q. Did that indicate that the bayou had filled up since the certificates were given, in 1869, or was it wanting in depth originally?

"A. We took the water as we found it.

102 "Q. Do you know whether any sediment had fallen into the bayou?

"A. My opinion is that from the sides and from the canal a sediment could go into the bayou. I am told there is a strong current up and down the bayou, made by the wind and tide, which could carry it right up."

We think it plain that bonds issued in 1869 and 1870 cannot be affected by the condition of the work in 1875, and that the specific objections set forth in petitioner's original brief, pp. 40, 49, ought to have been maintained, and they are again submitted to the attention of the court.

Sixth. It is submitted that your honors have erred in holding that the plaintiff ought to have proved that the mortgage created in favor of the State by act 116 of 1869 had been recorded. We submit that there is no law requiring any mortgagee to have his mortgage recorded. He may do it or not, as he chooses, without affecting the validity of the principal obligation. The State may or may not have lost its mortgage in this case, but the bonds are not affected. The statute does not declare that the bonds shall be issued and thrown on the market only after such recording, and neither the statute or any other law required the purchaser to find out if a registry had been made.

Seventh. It is submitted that your honors erred in not conceding to the plaintiff the well-settled rights of the *bona fide* holder of bonds issued by officers having power to issue them. The rule is universal
that where the power to make the obligation exists, as in this
103 case, the law under which the bonds are issued authorizes
the officers whose names are affixed to execute them, as in this case, and the bonds purport on their own face, as these do, to have been issued in pursuance of the statute and to pledge the faith of the State unconditionally under such statute for their payment to the holder, the production of such bond by a *bona fide* holder establishes, by conclusive presumptive evidence, that all precedent requirements to such issue have been complied with.

(Knox Co. *vs.* Aspinwall, 21 How., 542; Meyer *vs.* Muscatine, 1 Wall., 303; Mercer Co. *vs.* Heckett, 1 Wall., 93; Van Hostrope *vs.* Madison, — Wall., 297; Thomson *vs.* Lee Co., 3 Wall., 27; Supervisor *vs.* Schuncke, 5 Wall., 784; Aurora *vs.* West, 7 Wall., 82; Beloit *vs.* Morgan, 7 Wall., 619; Pendleton Co. *vs.* Avney, 13 Wall., 297; Mayor *vs.* Lord, 9 Wall., 414; Bissell *vs.* Jeffersonville, 24 Howard, 287; Roger *vs.* Burlington, 3 Wall., 654; Lexington *vs.* Butler, 14 Wall., 282; Grand Chute *vs.* Vinnegar, 15 Wall., 355; Illinois *vs.* Delafield, 8 Paige (N. Y.), 527; Town *vs.* Eaves, 2 Otto, 487.)

Eighth. It is submitted that your honors erred in stating that no branch of the government, not even the Legislature, could ratify these bonds.

In support of this proposition article 110 of the constitution is quoted, which provides that "no retroactive law shall be passed." We confidently submit that the various legislative recognitions of these bonds since 1869 are not retroactive laws, and we refer to the exposition of this same article given but lately by the Supreme Court of the United States, in the case of the Carrollton bonds held to be ratified by a subsequent statute. As no constitutional

104 question can be considered of slight importance, we beg to refer to this case, Gas-Light Co. *vs.* Clark, The Reporter (vol. 6, p. 259). It will be found that, as to the phrase in question, the views of the Supreme Court of the United States are directly opposed to those of your honors.

Ninth. It is submitted as matter of fact that your honors have erred in holding that the four miles of improved bayou and canal from Lake Borgne towards the river were not of proper width and depth when the bonds were issued. The certificate of Thompson and his testimony taken on a former trial and the testimony of Adley and Riorden seem to us to — established the contrary fully, that there was a proper depth.

The only contemporaneous witness for the defense on this point is Merrill, and he is very weak. He does not profess to have even made a measurement of any kind, and his theory is, not that the work was not dug deep enough (for the evidence is overwhelming that it was), but that in some spots earth slipped back. We submit that this sort of loose statement should not overcome the certificates and the testimony of plaintiff.

The importance of the question in this case transcends its limits. If plaintiff is to be defeated, who will ever be so insane as to advance any money to a work of public improvement in this State? At the last term in New Orleans your honors declared — an act to give State aid to the N. O. Pacific railway, bonds to be issued to the road as each section of ten miles shall be certified completed by a State engineer or other engineers detailed by the Governor. If your honors' opinion is to stand as the law of the State, such bonds can
105 never be negotiated. What intelligent man could buy them
for himself or for the widow, the orphan, the savings bank, or any other trust fund? In vain would the State engineer certify, in vain would the State officers, under their hands and seals, declare that they had been issued according to the statute. The reply would only be, "We live in London, New York, or Paris. We cannot go and measure your road. If we did we might make an error of a yard or a furlong. Your engineer may have made an error; he may die. Ten years hence some one else may have control of your State, and then it will be declared that there was an error of a yard or a furlong. There will be litigation, lawyers' fees, the attorney general will cite the case of the New York Guaranty & Indemnity Company, and we shall lose every cent we have advanced."

The premises considered, petitioner prays for a rehearing and for general relief.

(Signed) KENNARD, HOWE & PRENTISS,
EDWARD PHILIPS,
Attorneys for Plaintiff.

Oct. 22d, 1878.
(Signed) KENNARD, HOWE & PRENTISS.

Rehearing Refused. Offered in Evidence by Respondent. Filed March 13, 1885.

225.

Extract from the Minutes, Monday, January 13, 1879.

106 The court was duly opened pursuant to adjournment.

Present: Their honors Thomas C. Manning, chief justice; Rob't H. Marr, Alcibiade De Blanc, William B. Spencer, Edward D. White, associate justices.

His honor the chief justice pronounced the judgment and decree of the court in the following words:

N. Y. GUARANTY & INDEMNITY COMPANY *vs.* BOARD OF LIQUIDATION. } No. 6939.

It is ordered that the rehearing applied for in this case is refused.

Petition for Writ of Error. Offered in Evidence by Respondent. Filed March 13, 1885.

Petition for writ of error. Filed 17 February, '79.

Supreme Court of Louisiana.

THE NEW YORK GUARANTY & INDEMNITY COMPANY *vs.* THE BOARD OF LIQUIDATION. } No. 6939.

To the Honorable T. C. Manning, chief justice of the supreme court of Louisiana:

The petition of The New York Guaranty & Indemnity
107 Company, the plaintiff in this cause, respectfully shows—

That in the record of proceedings and also in the rendition of the final judgment in this cause by the honorable the supreme court of Louisiana there was drawn in question the validity of a statute of said State of Louisiana, namely, the act No. 11 of 1875, extra session, on the ground of its being repugnant to the Constitution of the United States, and the decision of the supreme court of Louisiana was in favor of the validity of said statute.

And there was also drawn in question the construction of a clause of the Constitution of the United States, to wit, article first, section ten, of the said Constitution, and the decision was against the right, title, privilege, and exemption specially set forth and under such clause of the Constitution by the plaintiff herein; that the judgment of the said supreme court of Louisiana is now final, and said court is the highest court of law and equity of the said State in which a decision in this cause could be had; that, as plaintiff is advised, informed, and believes, there is error in the final judgment against it as aforesaid, and that plaintiff has a right and desires to have the said cause removed by writ of error to the Supreme Court of the United States.

Wherefore petitioner prays that the writ of error herewith presented be allowed and the bond herewith presented approved, and a citation to defendant, duly signed, in accordance with the acts of Congress, and for all general relief.

(Signed) ED. PHILLIPS,
KENNARD, HOWE & PRENTISS,
Attorneys for Plaintiff.

108 Let a writ of error be allowed, as within prayed for and according to law, returnable to the Supreme Court of the United States on the second Monday of October, A. D. 1879.

—— ——.

(Copy.)

Writ of Error. Offered in Evidence by Respondent and Filed March 13, 1885.

Writ of error. Filed 17 February, 1879.

Supreme Court of Louisiana.

THE N. Y. GUARANTY & INDEMNITY COMPANY
vs.
THE BOARD OF LIQUIDATION.
} No. 6939.

Copy of a writ of error lodged in the clerk's office of the supreme court of Louisiana, in pursuance of the statute in such cases made and provided, this 17th day of February, one thousand eight hundred and seventy-nine.

(Signed) KENNARD, HOWE & PRENTISS,
" ED. PHILIPS,
Attorneys of Plaintiff in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Louisiana, Greeting:

109 Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The New York Guaranty & Indemnity Company, plaintiff, and The Board of Liquidation, defendant, wherein was drawn in question the validity of a statute of said State of Louisiana on the ground of its being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such its validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States and

the decision was against the right, privilege, and exemption specially set up or claimed under such clause of the Constitution, a manifest error hath happened, to the great damage of the said plaintiff, The New York Guaranty & Indemnity Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

110 Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

Submission.

Extract from the Minutes of Friday, March 13, 1885, Division A.

STATE *ex rel.* NEW YORK GUARANTY, Etc., Co.
vs.
ALLEN JUMEL.
No. 10679. Civil District Court.

Present: The Honorable A. L. Tissot, judge.

The mandamus herein prayed for by relator came on for trial this day—present, Judge Howe, for relator, and Attorney General M. J. Cunningham, for def't—and, after hearing evidence, counsel, and pleadings, was submitted and taken under advisement.

Reasons for Judgment. Filed March 23, 1885.

STATE OF LOUISIANA *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY
vs.
THE AUDITOR OF PUBLIC ACCOUNTS OF LA.
No. 10679. Civil District — for the Parish of Orleans, Div. A.

111 Article 14 of the constitution of this State divides the powers of the government into three distinct departments and confides each to a separate body of magistracy.

It reads as follows:

The powers of the government of the State of Louisiana shall be divided into three distinct departments, and each of these be confided to a separate body of magistracy, to wit, those which are legislative to one, those which are executive to another, and those which are judicial to another.

Article 15 prohibits each department from exercising any power belonging to another.

It reads as follows:

Art. 15. No one of those departments nor any persons or collection of persons holding office in one of them shall exercise power properly belonging to either of the others, except in the instance hereinafter expressly directed or permitted.

Now, article 202 specially provides that the taxing power shall be exercised by the Legislature.

Revenue and taxation.

Art. 202. The taxing power may be exercised by the General Assembly for State purposes, and by parishes and municipal corporations, under authority granted to them by the General Assembly, for parish and municipal purposes.

It is clear that relator herein wants this court to order the levy and collection of a tax by the respondent.

112 Taxation being an act of sovereignty which can be performed only by the Legislature and, by delegated power specially authorized by the constitution, by municipal corporations, &c., it is manifest that this court cannot grant the relief sought herein.

The authority under which the auditor is said to be compelled to levy the tax sought herein is section 7 of act No. 16 of 1869. It is claimed that under this provision of law it is his ministerial duty to levy and enforce the collection of this tax. It reads as follows:

"That in order to provide a fund for the semi-annual payment of interest upon the bonds issued in accordance with this act and the final redemption of said bonds, should the Mississippi & Mexican Gulf Ship Canal Company fail to meet the obligations set forth in the fourth and sixth sections of this act, when the deficit in interest to the year 1879 or the deficit and the annual instalment of $30,000 from that date to the final redemption of said bonds shall have reached the sum of $100,000, and as often thereafter as the said deficit shall have reached that sum, the auditor is hereby directed to determine by accurate calculation what rate of taxation on the total assessed value of all movable and immovable property in the State will be sufficient for the purpose of paying the said deficit in interest or annual instalments, or both; and it shall be also his duty to notify the several sheriffs and collectors of the rate of taxation as ascertained and fixed for the purpose aforesaid, and said tax
113 as ascertained and fixed is hereby levied upon all the movable and immovable property that may be assessed in this State; and it shall be the duty of the several sheriffs and tax-collectors to collect said tax, and the collection of the same shall be enforced as the law provides or may hereafter provide for the collection of taxes."

It is useless herein to enquire whether or not at the time of its enactment the statute could, as it intended and purported to do, confer upon this respondent the power to levy a tax to pay the bonds provided for by said act 116, for if the Legislature could then confer and respondent could then exercise the power, which is very doubtful, respondent cannot now do so. Article 15 of the present constitution of the State prohibits him, an officer of the executive department of the government, from exercising the power which properly belongs to the legislative department.

Application must be made to the Legislature to exercise this power of taxation. This court cannot order this levy of tax. The relief sought and the act relied upon being in conflict with the constitution now in force, neither the respondent nor this court has the power to levy or collect the tax provided for in said act 116 of 1869.

Besides, this act No. 16 of 1869 is in conflict with and repealed by act No. 3 of 1874, entitled "An act to provide for funding obligations of the State by exchange for bonds; to provide for principal and interest of said bonds; to establish a board of liquidation; to authorize certain judicial proceedings against it; to define and
114 punish violations of this act; to prohibit certain officers diverting funds except to provide by law, and to punish violations therefor; to levy a continuing tax and provide a continuing appropriation for said bonds; to prohibit injunctions in certain cases; to limit the indebtedness of the State and to limit State taxes; to annul certain grants of State aid; to prohibit the modification, novation, or extension of any contract heretofore made for State aid; to provide for the receipt of certain warrants for certain taxes, and to repeal all conflicting laws."

It is manifest that the grant of State aid under this act 116 of 1869 is repealed and annulled by section 12 of said act No. 3 of 1874, entitled An act relative to the assessment and collection of State taxes imposed for the payment of the bonds of the State and the principal and interest of the State debt by virtue of any law passed prior to the first of January, 1874, and to repeal all laws requiring or authorizing the Governor or auditor or treasurer to set apart funds in the State treasury for the payment of any bonds issued by the State prior to January 1, 1874, which prohibits respondent and all other officers of this State from complying with the mandamus sued for by relator.

They are now deprived of all power and authority to assess, collect, or enforce the payment of the tax asked for by relator, and, in the language of the statute (act No. 55 of 1874), no court, judge, justice of the peace, or other tribunal of this State shall entertain or have jurisdiction of any suit or proceeding to assess, collect,
115 or enforce the payment of any such tax. Article 209 of the constitution of the *United* States provides as follows:

Art. 209. The State tax on property for all purposes whatever, including expenses of government, schools, levees, and interest, shall not exceed in any one year six mills on the dollar of its assessed valuation, if the ordnance regarding the bonded debt of the State is adopted and ratified by the people; and if said ordinance is not adopted and ratified by the people the State tax, for all purposes aforesaid, shall not exceed in any one year five mills on the dollar of the assessed valuation of the property, and no parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollar of valuation; and provided, that for the purpose of erecting and constructing public buildings, bridges, and works of public improvement in parishes and municipalities the rates of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the property tax-payers of such parish or municipality entitled to a vote under the election laws of the State and a majority of same voting at such election shall have voted therefor.

It is well known that this tax of six mills for all purposes, authorized to be levied by this article of the organic law of the State and limited thereto, has wholly been levied by the Legislature and applied to purposes other than the payment of the bonds or coupons of relator; hence there is no power to levy or collect the tax asked for by relator.

116 The auditor can be compelled by mandamus only to perform a purely ministerial duty clearly prescribed by law. In these proceedings it is sought to compel him to the performance of an act in direct violation of the constitution and the laws of the State.

In the suit of those relators against the Board of Liquidation of the State of La., No. 8317 in the honorable the fifth district court, No. 6939 in the honorable the State supreme court, and No. 233 in the honorable the Supreme Court of the United States, it was decided that relator's bonds were not legal and valid obligations of the State; that they were issued in violation of the constitution and law and without any valid consideration; that relators were affected with notice of the requirements, conditions, and provisions of the law under which they were issued, and that those requirements and conditions had not been complied with.

If the questions then decided do not form *res adjudicata* they certainly tend to show that it is not the ministerial duty of the auditor to recognize them and levy and collect a tax to satisfy them.

Upon the whole there can be no doubt that the writ herein should be denied.

Let judgment be entered herein as prayed for by respondent.

117 *Judgment.*

STATE *ex rel.* NEW YORK GUARANTY COMPANY *vs.* ALLEN JUMEL, Auditor, *et al.*	No. 10679. Civil District Court for the Parish of Orleans, Division A.

For the reasons assigned in the written opinion of the court, this day delivered and on file—

It is ordered, adjudged, and decreed that there be judgment herein dismissing relator's demand at his costs.

Judgment rendered March 23d, 1885.
Judgment signed March 27th, 1885.

(Signed) A. L. TISSOT, *Judge.*

Motion of Appeal. Filed April 7, 1885, *and Entered on the Minutes of the Same Day.*

STATE *ex rel.* N. Y. GUARANTY & INDEMNITY COMPANY *vs.* ALLEN JUMEL, Auditor, &c.—O. B. STEELE Substituted. } No. 10679.

On motion of Kennard, Howe & Prentiss, attorneys for relator, and suggesting that there is error to its prejudice in the final judgment rendered herein on the 23d day of March, 1885, and signed on the 27th day of March, 1885—

118 It is ordered that an appeal to the supreme court of Louisiana be granted to the relator from said judgment, returnable to the said supreme court on the first Monday of May, 1885 (there not being time before that day to prepare the transcript), upon the said relator furnishing an appeal bond in the sum of one hunded dollars, with good and sufficient surety, conditioned as the law directs.

Appeal Bond. Filed April 10, 1885.

Know all men by these presents — the New York Guaranty & Indemnity Company, as principal, and Schnyder B. Steers, of New Orleans, as surety, are held and firmly bound unto Wm. J. McGeehan, clerk of the civil district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of one hundred dollars; for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated in the city of New Orleans, on the ninth day of April, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas the above-bounden principal, said N. Y. Guaranty & Indemnity Company, has filed a motion of appeal from a final judgment rendered against it in the suit of the State *ex rel.* N. Y. Guaranty & Indemnity Company *vs.* Allen Jumel, State auditor, etc., No. 10679 of the civil district court for the parish of Orleans, on the 23d day of March, 1885, and signed on the 27th day of
119 March, 1885, and has obtained an order of appeal:

Now, the condition of the above obligation is such that — the above-bounden principal, said Guaranty & Indemnity Co., shall prosecute its said appeal and shall satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of the sale of its estate, real or personal, if it be cast in the appeal; otherwise that the said surety, Schnyder B. Steers, shall be liable in its place.

THE NEW YORK GUARANTY & INDEMNITY CO.
(Signed) KENNARD, HOWE & PRENTISS.
" S. B. STEERS.

Signed, sealed, and delivered in the presence of—
(Signed) W. W. HOWE.
" MASSIE BURTON.

120 *Certificate.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, W. J. McGeehan, clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing one hundred and sixty-five pages do contain a true, correct, and complete transcript of all the proceedings had, documents filed, testimony and evidence adduced upon the trial of the cause wherein the State of Louisiana on the relation of the New York Guaranty & Indemnity Company is plaintiff and Allen Jumel, auditor of public accounts—O. B. Steele, substituted—as defendant, instituted in this court and now in the records thereof, under No. 10679 of its docket, except the document mentioned in note of evidence and which is there agreed shall go upon the original and by sample, or shall be referred to in printed reports, viz: Charter "A," bond 192 C; opinion of supreme court of Louisiana in case of Solomon & Simpson, No. 3358, and opinion of Supreme Court of U. S., 15 Otto, page 622.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on this 15th day of May, in the year of our Lord one thousand eight hundred and eighty-five, and in the one hundred and ninth year of the Independence of the United States of America.

[SEAL.] (Signed) W. J. McGEEHAN, *Clerk.*

121 Proceedings in the State Supreme Court.

Motion and Order for Time.

Extract from the Minutes of May 4th, 1885.

The court was duly opened, pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Robert B. Todd, Thomas C. Manning, Charles E. Fenner, associate justices.

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY
vs. } No. 9469.
ALLEN JUMEL, &c.

On motion of Kennard, Howe & Prentiss, of counsel for relators and appellants, and their affidavits being considered, it is ordered that the return day for the appeal in this case be extended to the third Monday of May, 1885.

Assignment of Errors. Filed May 22d, 1885.

Supreme Court of the State of Louisiana.

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY
vs.
ALLEN JUMEL, Auditor—O. B. STEELE Substituted. } No. 9469.

Assignment of errors.

And now comes relator in this cause and assigns for error in the judgment of the lower court the following:

122 1. The lower court erred in holding that the right of relator to demand what is demanded in the prayer of its petition has been or could be taken away by the 14th article of the constitution of Louisiana of 1879, dividing the powers of government into three distinct departments and confiding each to a separate body of magistracy; and relator claims, with respect to this ruling, its rights under the tenth section of article one of the Constitution of the United States, forbidding a State to pass any law impairing the obligation of a contract, of which rights it has been deprived by said ruling.

2. The lower court erred in holding that, conceding the validity of the 7th section of the act 116 of 1869 of the General Assembly, at the time of its enactment the power conferred and duty devolved thereby on the auditor was and could be taken away by the article 15 of the constitution of Louisiana of 1879, and relator claims, with respect to this ruling, its rights under the tenth section of article first of the Constitution of the United States, forbidding a State to pass any law impairing the obligations of contracts, of which rights it has been deprived by said ruling.

3. The lower court erred in holding that the said act 116 of 1869, and especially the seventh section thereof, is repealed by act No. 3 of 1874 and act No. 55 of 1874, so that the auditor could no longer exercise the power conferred and duly imposed by said act of 1869, and relator claims with respect to this ruling its rights under the tenth section of the article first of the Constitution of the 123 United States, forbidding a State to pass any law impairing the obligation of contracts, of which rights it has been deprived by said ruling.

4. The lower court erred in holding that the grant of State aid under the act 116 of 1869 is repealed and annulled by section 12 of said act No. 3 of 1874 and by the act No. 55 of 1874, and relator claims, with respect to this ruling, its rights under section ten, article one, of the Constitution of the United States, forbidding a State

to pass any law impairing the obligation of its contracts, of which rights it has been deprived by said ruling.

5. The lower court erred in holding that the power of the auditor to comply with the demand of relator has been taken away by the 209th article of the constitution of Louisiana of 1879, and relator claims, with respect to this ruling, its rights under section ten, article one, of the Constitution of the United States, forbidding a State to pass any law impairing the obligation of contracts, of which rights it has been deprived by said ruling.

6. The lower court erred in declaring that in the cause No. 6939 of the supreme court of Louisiana and No. 233 (Oct. term, 1881) of the Supreme Court of the United States it was decided that the relator's bonds were not legal and valid obligations of the State; that they were issued in violation of the constitution and law and without any valid consideration; that relators were affected with notice of the requirements, conditions, and provisions of the law 124 under which they were issued, and that those conditions and requirements had not been complied with, and hence that it is not the ministerial duty of the auditor to comply with the demand of relator.

7. The lower court erred in denying the writ prayed for by relator and in dismissing its demand.

And for said errors and the others apparent in the record relator prays that the judgment appealed from may be reversed and judgment rendered for relator, as prayed for, and for general relief.

(Signed) KENNARD, HOWE & PRENTISS,
Attorneys for Relators.

Continuance.

Extract from the Minutes of Thursday, November 19th, 1885.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Robert B. Todd, Thomas C. Manning, Charles E. Fenner, associate justices.

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY
vs.
ALLEN JUMEL, &c.
} No. 9469.

This case was duly called for trial and, by written consent of counsel for parties in interest, ordered continued.

125 *Called, and Appearance.*

Extract from the Minutes of Tuesday, March 16th, 1886.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P.

Poche, Robert B. Todd, Thomas C. Manning, Charles E. Fenner, associate justices.

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY *vs.* ALLEN JUMEL, &c.	No. 9469.

This case was duly called for trial and, after hearing argument of W. W. Howe, of counsel for plaintiffs and appellants, was ordered continued for oral argument to Wednesday, March 17th, 1886, at 11 o'clock a. m.

Argued and Submitted.

Extract from the Minutes of Wednesday, March 17th, 1886.

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY *vs.* ALLEN JUMEL, &c.	No. 9469.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Robert B. Todd, Thomas C. Manning, Charles E. Fenner, associate justices.

This case, continued from yesterday for oral argument, came up for trial and, after hearing argument of counsel—M. J. Cunningham, for the State, and W. W. Howe, for plaintiff and appellant—was ordered submitted on the briefs and papers filed.

126 *Final Decree and Opinion.*

Extract from the Minutes of Monday, April 5th, 1886.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Robert B. Todd, Thomas C. Manning, Charles E. Fenner, associate justices.

His honor Mr. Chief Justice Bermudez pronounced the opinion and judgment of the court in the following case:

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY *vs.* ALLEN JUMEL, &c.	No. 9469. Appeal from the Civil District Court for the Parish of Orleans.

The judgment appealed from is affirmed with costs.

127 *Final Decree and Opinion.*

Supreme Court of the State of Louisiana.

CLERK'S OFFICE, NEW ORLEANS, *April 5th*, 1886.

STATE *ex rel.* NEW YORK GUARANTY & INDEMNITY COMPANY *vs.* ALLEN JUMEL, Auditor. } No. 9469.

Appeal from the civil district court for the parish of Orleans.

Mr. Chief Justice Bermudez delivered the opinion and decree of the court in the words and figures following, to wit:

This is an application for a mandamus to compel the State auditor to perform what is represented as a ministerial duty.

The relatrix company charges that it owns $250,000 of the bonds of the State issued under the provisions of act No. 116 of 1869; that the interest has been paid thereon up to 1873, none being paid since; that by the 7th section of said act it is made the duty of the State auditor to calculate the rate of taxation on the total assessed value of property in the State sufficient to pay the interest, and to notify said rate, when fixed, to the tax-collectors, requiring them to collect the same in manner provided by law.

The auditor, among other defenses, sets up substantially that this is a proceeding to enforce a State contract; that the State is not a party to the suit; that he has no authority to represent
128 the State in it; that whatever duty and power were once
imposed on the State auditor by the 7th section invoked have ceased to form part of his functions, because forbidden by the State constitution, which prohibits the levy of State taxes for any purpose in excess of six mills; that the court has no jurisdiction on the subject-matter, and cannot compel him to make the computation asked and issue instructions for the collection of the tax thus ascertained.

From an adverse judgment the relatrix company has appealed.

It is proper to premise that it appears from the record that the present plaintiff, as the holder of the same bonds, took steps to have them funded at the rate of sixty cents on the dollar, as a compromise, under the terms of act No. 11 of 1875, contradictorily with the State board of liquidation, but was not allowed to do so, the court holding that the bonds had not issued "in strict conformity to law and for a valid consideration," and that want of knowledge of the fraud and acquisition for a valid consideration would not relieve third parties.

Manning's U. R. C., p. 198.

On writ of error, the United States Supreme Court, after reviewing the facts, considered that the question was not whether, in an authorized action against the State, act 11 permitted the note to prove, as against a *bona fide* holder, that the bond was invalid, but whether such holder was entitled to the funding offered to holders of securities valid in the hands of the first taker.

The court held that every legal right which the original holder acquired still remained and was enforceable by the company, the obligation of the State to pay continuing to exist and the
129 judgment refusing the finding being no bar to any proper proceeding for payment.

The court, on the Federal question, distinctly observed that the State had a right to say, when she proposed a scheme for the compromise of her debts, that auditors should be included, and that as the act in question, No. 11 of 1875, did not impair the obligation of the contract with the first taker it was not to be viewed as unconstitutional.

The Federal question having been correctly decided below, the judgment was consequently affirmed.

The present proceeding contemplates the enforcement of the contract of the State with the first taker, insisting on specific performance by the levying and collecting of the required tax.

The State auditor denies the jurisdiction of the court because it is a suit against the State, who is not made a party and who has never consented to become such, because he does not and cannot represent the State, the duties and powers conferred by the section relied on having been recalled by the constitution.

The fact is that the State is the real defendant in the case, and that she has not been made a party.

Neither does the act of 1869, nor any other legislation, permit the State to be sued in this or any other similar action.

It would be pure loss of time to reason and to adduce authorities to show that the pretensions of plaintiff cannot be adjudicated upon in the absence of the State, for it is self-evident that the remedy asked could not be allowed without finally determining that the bonds sued on constitute part of the indebtedness of the State which must be paid. This cannot be done.

But the relatrix company claims that suit was authorized
130 by the act of 1869, section 7, against the State represented by the auditor; that the suit is thus brought, and that the defense does not hold good.

It is sufficient to say that if this was ever so, the authority to sue as well as to be sued were [was] formally revoked by the State in the exercise of her supreme political power, as results from the prohibitions placed by her constitution against the levy and collection of any State tax in excess of six mills.

V. Const., art. 209, and the State debt ordinance.

In the case of Louisiana *vs.* Jumel, and of Elliot *vs.* Nitty, both taken from the United States circuit court for the eastern district of Louisiana to the U. S. Supreme Court, in which it was sought to take from the State treasury, by proceedings against the auditor and the treasurer, money collected to pay coupons of the State bonds maturing on January 1, 1880, and diverted by the debt ordinance, which forms part of the constitution, and applied to other and independent purposes, the Supreme Court of the U. S. distinctly held that the ordinance having forbidden the payment of the interest and withdrawn from the State officers the means of carrying her contract into effect, the execution of the contract could not be enforced nor the relief sought awarded in a suit to which the State is not a party and which is brought against officers who are merely obeying the positive orders of the supreme political powers of the State.

107 U. S., 712 (XVII Otto).
See also 33 A., 498, quoted with approbation.

The reply of the relatrix company to this position is that the doctrine is established and familiar that as to the contract
131 rights acquired by it no provision of the constitution of 1879
can have any legal effect. In support many authorities are quoted, but they have no bearing. They differ *toto cœlo*, as not one refers to a suit by an individual to enforce a state contract affected by some constitutional provision expressing the adverse will of the State to the execution of the contract.

It was long since solemnly announced by the Supreme Court of the United States, through the organ of Chief Justice Taney:

"Those who deal in the bonds and obligations of a sovereign are aware that they must rely altogether on the sense of justice and good faith of the State, and that the judiciary of the State and the courts of the United States are expressly prohibited from exercising such jurisdiction."

Bank of Washington *vs.* Arkansas, 20 How., 530.

This announcement has never been questioned or gainsaid, so well founded is it on principles of the highest order in political economy. 33 A., 511–'2.

In the Virginia coupon cases, 114 U. S., 332, the principle was re-adjudged, the court, by a mere majority, holding, however, that it did not apply to a case in which the State actively attempted a violation of its contract.

The main question there was, after the State had issued her bonds with coupons to be received in payment of taxes, the State could revoke the right to give — in payment, and, where an offer or tender had been made, whether the State could seize the taxed property and subject it to the claim.

The injunction was maintained.

132 In that case, nevertheless, four justices dissenting, one of
them, Mr. Justice Bradley, well said:

* * * "No State can be coerced into a fulfillment of its contracts and obligations to individuals by the instrumentality of the Federal judiciary."

It is true it cannot proceed against them contrary to its contract; but, on the other hand, it cannot be proceeded against on its contract. All those who deal with a State have notice of this fundamental condition. They know or are bound to know that they must depend upon the faith of the State for the performance of its contracts, just as if no Federal Constitution existed, and cannot resort to compulsion, unless the State chooses to permit itself to be sued.

Moreover, the eleventh amendment is not intended as a mere formula of words to be slurred over the subtle methods of interpretation, so as to give it as literal compliance without regarding its substantial meaning and purpose. It is a grave and solemn condition exacted by sovereign States for the purpose of preserving and vindicating their sovereign rights to deal with their creditors or others propounding claims against them according to their own views of what may be required by public faith and the necessity of the body politic.

We have no right, if we were disposed, to fritter away the substance of this solemn stipulation by any neat and skillful manipulation of its words. We are bound to give it its full and substantial meaning and effect. It is only time [thus] that all public instruments should be construed.

133 In the matter now under consideration we conclude that, as the object in view is the enforcement of a contract of the State; as the State is not, directly or indirectly, a party to the suit; as the defendant has no authority to represent the State, we have no jurisdiction to hear the cause and determine whether or not the obligation of the contract has been impaired.

Under such circumstances, the judgment appealed from is affirmed, with costs.

134 *Petition for Writ of Error.*

Supreme Court of the State of Louisiana.

STATE *ex rel.* THE NEW YORK GUARANTY & INDEMNITY COMPANY
vs.
ALLEN JUMEL, Auditor, &c.; OLIVER B. STEELE, Auditor of Public Accounts of the State of Louisiana, Substituted as Defendant.
No. 9469.

To the Honorable Edward Bermudez, chief justice of the supreme court of the State of Louisiana:

The petition of the New York Guaranty & Indemnity Company, relator in the above-entitled cause, respectfully represents—

That on the 5th day of April, 1886, the honorable the supreme court of Louisiana rendered its opinion and decree in the above-entitled cause affirming the judgment of the lower court, and which opinion, decree, and judgment of the said supreme court was against petitioner and in favor of Oliver B. Steele, auditor of public accounts of the State of Louisiana, who was respondent in the cause and who had, by order of the lower court, before answer there filed, been substituted as defendant in lieu of his predecessor in office, Allen Jumel; that said decree or judgment of said supreme court is a final judgment of the highest court of law and equity in Louisiana in which a decision could be had in said suit.

135 That there was drawn in question in said suit by relator the validity of sundry statutes of Louisiana and provisions of its constitution, and especially the acts Nos. 3, 4, and 55 of 1874, and the provisions of the constitution of 1879 with respect to powers of government and the State debt on the ground of their being repugnant to the Constitution of the United States, and especially its provision forbidding the impairment of contracts, and the said decision was in favor of the validity of said statutes and constitutional provisions of Louisiana.

That there were claimed in said suit rights in behalf of relator under the act 116 of 1869 of Louisiana, and protected under the Constitution of the United States, and especially by the clauses protecting contracts from impairment, and said decision was against the claims of petitioner. Under the Constitution of the United States, as by the pleadings, proceedings, and decrees in said cause and the assignments of error will appear, petitioner shows that it is entitled in law and justice to a writ of error to the Supreme Court of the United States in order that said judgment or decree may be there corrected.

And it prays for the same and for citation to be addressed to said Oliver B. Steele, auditor of public accounts of the State of Louisiana, and that your honor will fix and affirm a proper bond, and for general relief.

(Signed) KENNARD, HOWE & PRENTISS,
Attorneys for Petitioner, Relator.

136 *Order.*

Writ allowed on bonds and security being furnished for two hundred and fifty dollars, conditioned as the law directs, although I see not what the decision was which determined any Federal question adversely to petitioner.

N. O., June 3d, 1886.

(Signed) E. BERMUDEZ,
Chief Justice Supreme Court of the State of Louisiana.

Bond for Writ of Error.

STATE *ex rel.* N. Y. GUARANTY & INDEMNITY CO.
vs.
O. B. STEELE, Substituted.

Supreme Court of Louisiana.
No. 9469.

Know ye all men by these presents that we, The New York Guaranty and Indemnity Company of the City of New York and William W. Howe, of New Orleans, as surety, are held and firmly bound unto Oliver B. Steele, auditor of public accounts of the State of Louisiana, in the full and just sum of two hundred and fifty dol-

lars, to be paid to the said Oliver B. Steele, auditor of public accounts of the State of Louisiana, his successors and certain attorney, executors, administrator-, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, ad-
137 minstrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at the term of the supreme court of Louisiana, sitting in New Orleans, in a suit No. 9469, depending in said court, wherein the State of Louisiana *ex rel.* The New York Guaranty & Indemnity Company was plaintiff and the said Oliver B. Steele, State auditor as aforesaid, was defendant, judgment was rendered against the plaintiff, relator, and in favor of said defendant; and the plaintiff, relator, having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Oliver B. Steele, auditor, &c., citing and admonishing him to be and appear in the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiff in error, relator as aforesaid, shall prosecute its writ to effect and answer all costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE NEW YORK GUARANTY & INDEMNITY CO.
(Signed) KENNARD, HOWE & PRENTISS.
(Signed) W. W. HOWE.

Sealed and delivered in the presence of—
(Signed) MASSIE BURTON.

138 UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans:

Personally appeared William W. Howe, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in New Orleans, and is worth the full sum of two hundred and fifty dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) W. W. HOWE.

Subscribed and sworn before me this 2d day of June, 1886.

[SEAL.] (Signed) OCTAVE MOREL, *Not. Pub.*

Approved.
(Signed) E. BERMUDEZ,
Chief Justice.

139 *Citation.*

THE UNITED STATES OF AMERICA:

On writ of error to supreme court of Louisiana.

The President of the United States to Oliver B. Steele, auditor of public accounts of the State of Louisiana (substituted for Allen Jumel, auditor, &c.), Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Louisiana, at New Orleans, wherein The State of Louisiana on the relation of the New York Guaranty & Indemnity Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of June, in the year of our Lord one thousand eight hundred and eighty-six.

[SEAL.] (Signed) E. BERMUDEZ,
Chief Justice of the Supreme Court of the State of Louisiana.

140 *Service Accepted.*

Service of within citation acknowledged.
(Signed) M. J. CUNNINGHAM,
Attorney General of Louisiana, for Defendant in Error.

141 *Certificate of the Clerk.*

UNITED STATES OF AMERICA, *State of Louisiana:*

Supreme Court of the State of Louisiana.

I, George W. Dupre, clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans, do hereby certify that the foregoing one hundred and forty pages contain a full, true, and complete transcript of the proceedings had in the civil district court for the parish of Orleans in a certain suit wherein State *ex rel.* New York Guaranty & Indemnity Company were [was] plaintiff and Allen Jumel, auditor of public accounts, was defendant, and also of all proceedings had in this supreme court in the appeal taken by said plaintiff, which appeal is now on the files thereof under No. 9469.

Seal Supreme Court of the State of Louisiana.

In testimony whereof I have hereunto set my hand and affixed the seal of this court this 12th day of July, 1886.

GEORGE W. DUPRE, *Clerk.*

142 *Certificate of the Judge.*

UNITED STATES OF AMERICA, *State of Louisiana:*

Supreme Court of the State of Louisiana.

I, Felix P. Poche, associate justice, acting chief justice, of the supreme court of the State of Louisiana, do hereby certify that George W. Dupre is clerk of the supreme court of the State of Louisiana; that the signature of George W. Dupre to the within certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all his official acts as such.

In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this 12th day of July, 1886.

[Seal Supreme Court of the State of Louisiana.]

F. P. POCHÉ,
Associate Justice, Acting Chief Justice.

143 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of Louisiana, holding sessions in the city of New Orleans, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Louisiana, at the city of New Orleans, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Louisiana on the relation of the New York Guaranty and Indemnity Company, as plaintiff, and Oliver B. Steele, auditor of public accounts of the State of Louisiana (substituted for Allen Jumel, his predecessor in office), as defendant, said suit bearing the number 9469 of the docket of said supreme court of Louisiana and being entitled The State of Louisiana *ex rel.* The New York Guaranty and Indemnity Company *vs.* Allen Jumel, auditor, &c., vs. *Allen Jumel, auditor, &c.*, O. B. Steele, auditor, &c., substituted, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, and wherein was drawn in question the construction of a clause
144 of the Constitution of the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, a manifest error hath happened, to the great damage of the said plaintiff and relator, The New York Guaranty and Indemnity Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send

the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 3rd day of June, in the year of our Lord one thousand eight hundred and eighty-six.

E. R. HUNT,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by—
E. BERMUDEZ,
Chief Justice of the Supreme Court of the State of Louisiana.

145 [Endorsed:] (Supreme court of Louisiana.) No. 9469. State *ex rel.* N. Y. Guaranty & Indemnity Company *versus* Allen Jumel, &c., Oliver B. Steele, auditor, &c., substituted. Writ of error. Supreme court of La. Filed June 3d, 1886. John Augustin, d'y clerk.

146 THE UNITED STATES OF AMERICA:

On writ of error to supreme court of Louisiana.

The President of the United States to Oliver B. Steele, auditor of public accounts of the State of Louisiana (substituted for Allen Jumel, auditor, &c.), Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Louisiana, at New Orleans, wherein The State of Louisiana on the relation of the New York Guaranty and Indemnity Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of June, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal Supreme Court of the State of Louisiana.]

E. BERMUDEZ,
Chief Justice of the Supreme Court of the State of Louisiana.

147 [Endorsed :] Supreme court of Louisiana. No. 9469. State *ex rel.* N. York Guaranty & Indemnity Company *vs.* Allen Jumel, &c. Citation. Marshal's return. Supreme court of Louisiana. Filed Ju. 7, 1886. George W. Dupre, clerk.

Service of within citation acknowledged.
New Orleans, June 5th, 1886.

M. J. CUNNINGHAM,
Attorney General of La., for Def't in Error.

Endorsed on cover: Louisiana supreme court. No. 140. The State of Louisiana *ex rel.* The New York Guaranty and Indemnity Company, plaintiff in error, *vs.* Oliver B. Steele, auditor of public accounts of Louisiana, substituted for Allen Jumel, auditor, &c. Filed October 11, 1886.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1889.

No. 140.

STATE EX REL. NEW YORK GUARANTY AND INDEMNITY COMPANY

versus

O. B. STEELE, AUDITOR, ETC., SUBSTITUTED.

BRIEF OF RELATOR, PLAINTIFF IN ERROR.

W. W. HOWE,
Of Counsel for Relator, Plaintiff in Error.

DECEMBER, 1889.

T. H. Thomason, Printer, New Orleans.

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THE FACTS.

The relator, about July, 1871, became the holder in good faith before maturity and for value of the bonds involved in this controversy. It advanced the sum of $200,000 on these securities, and the money went to the object for which it was destined, pp. 20, 21 and 44, 45. The Supreme Court of Louisiana had already decided, in May, 1871, at the request and for the benefit of the State, in the case of Solomon and Simpson, 23 Annual Reports, p. 405, that the bonds constituted a part of the State Debt, and this decision had gone out to the financial world. The canal, to aid which the bonds were issued, was constructed so as to become a channel of commerce, and is now used daily as such, p. 44.

The petition, which is verified according to law, shows that the bonds were "made, executed and issued by the State of Louisiana, under and in accordance with the provisions of the Act of the General Assembly, Number 116 of 1869, entitled 'An Act providing State aid in the construction of the Mississippi and Mexican Gulf Ship Canal and for the issue of State bonds therefor,' approved March 8th, 1869, each of said bonds being for the sum of one thousand dollars, and having fifty-one coupons attached of thirty-six 50-100 dollars each, payable respectively on the 1st March and 1st September of each year until the maturity of said bonds.

"That each of said bonds is dated March 1st, 1869, is endorsed by the President and Treasurer of said Canal Company, and has thirty years to run. A list of said bonds by their numbers is hereto attached as part hereof and as Exhibit 'B.' Said bonds are signed by the Governor and Secretary of State of Louisiana and have the seal of the State affixed; and certify, under said signatures and seal, that said bonds have each been issued for the purposes of said Act, to aid in the construction of the Mississippi and Mexican Gulf Ship Canal, and, that for the principal and accruing interest on said bonds, the faith and credit of the State of Louisiana are pledged by said Act of the General Assembly No. 116, approved March 8th, 1869, and which is published in full on the reverse, of each of said bonds, as by the said bonds will more fully appear, and one of said bonds with its coupons being No. 192, is hereto annexed as Exhibit 'C' as a sample of the whole, the rest being the same, except in serial number.

"That said bonds have been repeatedly recognized as a part of the State Debt by all branches of the State Government, and were pleaded and recognized as such by and for the benefit of the State, in the case of the State vs. Graham, No. 3358 of the Docket of the Supreme Court of Louisiana. (23 An. 405.)

"That the interest was duly paid by the State on said bonds, up to and including 1st September, 1873, but none has been paid since that time, and the arrears of interest on the whole issue, to-wit: on the issue of $474,000, or what remains outstanding up to September, 1883, is upwards of $200,000, which it is the duty of the State of Louisiana to pay, but which payment has been neglected and refused. That the said Canal Company has, since September, 1873, failed to meet any of its obligations under the fourth and sixth Sections of said Act, and the deficit in interest, being as aforesaid, it is the duty of the Auditor of Public Accounts to proceed under and execute the said law, No. 116 of 1869, so far as he is concerned, and especially the seventh Section thereof, by calculating the rate of taxation on the total assessed value of all the movable and immovable property in the State, sufficient to pay said deficit in interest, and by notifying the several sheriffs and tax collectors of the rate of taxation so ascertained, and fixed, and to require them to collect the same, in the manner provided by law, for other taxes.

"That the arrears of interest due relator exceed the sum of $180,000.

"That relator has duly demanded of Allen Jumel, the Auditor of Public Accounts of the State of Louisiana, that he should perform his duty under said law as aforesaid, and he has refused to do so."

The relator prayed that a mandamus may issue herein according to law, commanding said Allen Jumel, Auditor of Public Accounts of the State of Louisiana, to comply with his duty in the premises, under and in accordance with the Act No. 116 of 1869, and especially under the seventh Section thereof, by calculating the rate of taxation on all the movable and immovable property in the State, sufficient to comply with its provisions and by notifying the proper officers to collect the same, etc.

The seventh Section of Act No. 116 of 1869, which is referred to in the petition and printed on each of the bonds, is quoted in the opinion of the lower court, p. 62, and the whole Act is printed in the Appendix.

The alternative writ of mandamus was duly issued. Thereafter the present Auditor, O. B. Steele (who is still Auditor, and will be until 1892) was substituted as defendant, and filed his answer. The Answer does not traverse, specially, any allegation of fact in the petition of relator, but simply raises questions of law in the nature of peremptory exceptions, as follows, pp. 6-8:

1. That the Auditor cannot levy a tax, such levy being a legislative act.
2. That by the Acts No. 3 and No. 55 of 1874, the grant of State aid to the Canal Company was repealed, and the respondent forbidden to comply with the mandamus sued out by relator.
3. That the State tax is limited to six mills, and the whole of that has been levied.
4. That this is virtually a suit against the State, which cannot be maintained.

5. That in the suit of the relator against the Board of Liquidation, No. 8317, Fifth District Court, No. 6939 of the Supreme Court of Louisiana, and No. 233 of the Supreme Court of the United States, it had been decided that relator's bonds are not legal and valid obligations of the State.

6. By supplement, that the Act No. 116 of 1869 was invalid under the Constitution of 1868, because it did not provide adequate means for payment of principal and interest of the bonds. This point, however, was not urged below, nor noticed by either Court, and is, we presume, abandoned.

The petition being verified according to law, and there being no special traverse in the answer of any averment of fact, and the defenses being in the nature of peremptory exceptions, the facts sworn to are taken for true. Watts vs. Poliec Jury, 11 An. 141; C. P. 841, 843; Levy vs. English, 4 Ark. p. 67; Com. Bank vs. Canal Com., 10 Wendell, 25.

To prevent any cavil, however, further and full proof was made, showing that the allegations of fact in the petition are strictly correct. See note of evidence, pp. 9-39, and the documents therein set forth.

The Judge of the Civil District Court refused the mandamus, for reasons printed at pp. 61-64, and the relator appealed to the Supreme Court of Louisiana—and filed assignments of error, pp. 67-68.

The Supreme Court affirmed the judgment appealed from in the opinion and decree found at pp. 70-73, and thereupon the cause was brought by writ of error to this Court, pp. 77-78.

The bond which was made part of the petition and as a sample of the 250 which were offered in evidence, is copied in the Appendix of this brief, and contains on the back the Act of 1869, referred to; see note of evidence p. 9, consent p. 10.

The only defense really urged in the case is that all our rights and remedies have been since 1871 taken away by the enactments set up by respondent, or referred to by the courts below, and which we shall print in the appendix hereof; to which we shall reply, that these enactments, as to the *bona fide* holder of the bonds are null and void, and reputed as not written, and that this Court has the power to so declare.

ASSIGNMENT OF ERRORS.

1. The Supreme Court of Louisiana erred in affirming the judgment of the Court of first instance, refusing the mandamus, the only ground for refusing the relief being found in Statutes and constitutional enactments of Louisiana, which, as construed by the Court to deny or take away relator's rights and remedies are null and void, being in conflict with Section 10 of Article 1, of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts.

2. The Supreme Court of Louisiana erred in affirming the judgment of the lower court, so far as it was based on the 14th Article of the Constitution of Louisiana of 1879, dividing the powers of goverment into three distinct departments, it being manifest that said Article as construed to deny the relief demanded by relator violates Section 10 of Article 1 of the Constitution of the United States, which forbids any State to pass a law impairing the obligation of contracts.

3. The Supreme Court of Louisiana erred in affirming the judgment of the lower court, so far as it was based on the 15th Article of the Constitution of Louisiana of 1879, with respect to the different departments of government; it being manifest that said Article as construed to deny the relief demanded by relator violates Section 10 of Article 1 of the Constitution of the United States, which forbids any state to pass a law impairing the obligation of contracts.

4. The Supreme Court of Louisiana erred in affirming the judgment of the lower court, so far as it was based on Article

202, or other Articles of the Constitution of Louisiana with respect to taxation, such Articles as so construed to take away any rights of relator, being in violation of Section 10 of Article 1 of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts.

5. The Supreme Court of Louisiana erred in affirming the judgment of the lower court, so far as the same was based on the Act No. 3, of 1874, to fund the State Debt, such Act, as construed to take away any right of relator, being in violation of Section 10 of Article 1 of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts.

6. The Supreme Court of Louisiana erred in affirming the judgment of the lower court, so far as the same was based on the Act No. 55 of 1874, which undertook to annul and repeal the tax provided in favor of relator, and all remedy to enforce such rights, in violation of the Constitution of the United States, Article One, Section Ten, forbidding a State to pass any law impairing the obligation of contracts.

7. The Supreme Court of Louisiana erred in affirming the judgment of the lower court, so far as it was based on the Article 209 of the Constitution of Louisiana, limiting State taxation; which limitation, so construed, violates the contract rights of relator, and the Article One, Section Ten of the Constitution of the United States, forbidding a State to pass any law impairing the obligation of contracts.

8. The Supreme Court of Louisiana erred in affirming the judgment of the lower court, so far as the same was based on the decision cited in the case called "No. 233" of the docket of this Court (reported as Guaranty Company vs. Board of Liquidation, 105 U. S., p. 622), such decision being incorrectly stated by the lower court, and so construed as to militate against the rights of relator thereunder.

9. The Supreme Court of Louisiana erred in refusing the mandamus, and in holding that the Act (116) of 1869 (Section 7) did not authorize this proceeding, it being manifest that this ruling was based upon enactments of the State subsequent to such Act, which undertook to take away contract rights of relator in violation of Article One, Section Ten of the Constitution of the United States, forbidding a State to pass any law impairing the obligation of contracts.

10. The Supreme Court of Louisiana erred in holding that the right conferred by the 7th Section of the Act 116 of 1869 was "formally revoked by the State (of Louisiana) in the exercise of her supreme political power, as results from the prohibitions placed by her Constitution against the levy and collection of any State tax in excess of six mills by Art. 209 of her Constitution, and the State Debt Ordinance," the same, as so construed, violating Article One, Section Ten of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts.

11. It not being pretended that the right to a mandamus did not exist in favor of such a relator in the premises prior to the year 1874, and that it does not still exist under the law of Louisiana in favor of a relator as against the Auditor of Public Accounts, to enforce a ministerial duty generally, the Supreme Court of Louisiana erred in refusing the mandamus and in holding that such sole remedy could be taken away from relator as to the duty imposed by Section 7 of the Act 116 of 1869, by the said subsequent enactments, viz: By Act 3 of 1874, Act 55 of 1874, and by the provisions of the Constitution of Louisiana of 1879 respecting taxation and the State Debt, and by Constitutional Ordinance of 1879, the fact being that all said enactments, undertaking as they do to repudiate the bonds of relator and to take away all remedies for the enforcement of its rights, impair the contract rights of relator in the premises and

violate Section ten of Article one of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts.

12. The Supreme Court of Louisiana erred in refusing the mandamus and in holding (pp. 72, 73) that this proceeding was forbidden by the Eleventh Amendment of the Constitution of the United States.

13. The Supreme Court of Louisiana erred in refusing the mandamus and in holding that it had no jurisdiction to hear the cause and decide whether the contract rights of relator under the Act 116 of 1869 had been impaired (p. 73), it being obvious that the only reason for so holding was the passage of enactments by the State of Louisiana which impaired the obligation of the said contracts with relator and violated Section ten, Article one, of the Constitution of the United States which forbids a State to pass any law impairing the obligations of contracts—said enactments being the Act No. 3 of 1874, Act No. 55 of 1874, and the provisions of the Constitution of 1879, known as Articles 202, 209, and the Debt Ordinance, so-called, which are printed in the appendix hereto.

14. The Supreme Court of Louisiana erred in denying the rights of relator on the authority of the federal decisions in the cases of Louisiana vs. Jumel, and Elliott vs. Wiltz, 107 U. S. 711, and Bank vs. Arkansas, 20 Howard, 530.

ARGUMENT.

I.

The Auditor, in his answer, and the lower Judge, in his opinion, seem to have misunderstood, at the outset, the precise demand of relator. They seem to think we are asking that the Auditor be directed to LEVY a tax. It is, in consequence of this misunderstanding, that we find them stating repeatedly that taxation is a legislative function, and that an executive officer cannot levy a tax. We call attention, at once, to this misapprehension.

We are not asking the respondent to levy a tax, nor the Court to make him do so. The 7th Section of the Act No. 116 of 1869, as quoted by the lower Judge, after providing that the Auditor shall *estimate* the necessary amount of tax, and notify the tax collectors thereof, proceeds to declare that "said tax, as ascertained and fixed, *is hereby levied* on all the movable and immovable property that may be assessed in this State."

In other words, the Legislature levies the tax and the Auditor simply acts as an arithmetician in calculating the amount which each taxpayer is to pay. That our view is correct was settled in Flower vs. Legras, 24 An. 205, and State vs. McGinnis, 26 An. 558, where, under the 9th Section of the Revenue Act of 1870, Extra Session, p. 130, an interest tax, precisely similar in principal, was provided for. There was nothing new or strange about the 7th Section of this Act of 1869, or the 9th Section of that Act of 1870, Extra Session. Their provision were copied from those in the various Acts giving State aid, under the Constitution of 1852, in regard to the validity of which there was never any dispute, and which were decided to be valid in Hamlin vs. Board, 30 An. 445. See, for example, the Act in regard to the Opelousas R. R., No. 176 of 1853, § 4, the Jackson R. R., No. 177 of same year, Section 4, the Baton Rouge R. R., No. 134 of 1857, § 4, and the Grosse Tête road, No. 179 of 1853.

We do not, therefore, ask that the Auditor be required to levy a tax. The tax has been levied by the Legislature in accordance with a system that prevailed in Louisiana from 1852 to the time that State aid was finally prohibited or disused. We simply ask that the Auditor be ordered to estimate the amount of the tax, to notify it to the tax collectors for collection, and to perform his other plain ministerial duties under that 7th Section, as set out in our petition.

II.

This disposes at once of all that branch of the defense which goes on the assumption that we are calling on the Auditor to legislate. It follows that the lower Judge erred in applying against us the provisions or the 14th, 15th and 202d Articles of the Constitution of 1879, with regard to the distribution of the powers of government, and the Supreme Court of Louisiana erred in affirming his judgment, if the affirmance could be placed on this ground; and for two reasons:

1. Because we are not asking that the Auditor should perform a legislative act, but one purely mathematical and ministerial, and which has been performed in his office repeatedly, for nearly thirty years; and,

2. Because, if the relator had a contract right, under that 7th Section of the Act of 1869, it could not be taken away by any provision, general or special, of the Constitution of 1879, any more than by any statute subsequent to 1869. White vs. Hart, 13 Wallace, 616; State ex rel. Gas Light Co. vs. City of New Orleans, 37 An. 440; Nelson vs. St. Martins Parish, 111 U. S. 716; *Id.* 32 An. 884; Fisk vs. Police Jury, 116 U. S. 131.

III.

The lower Judge erred in deciding that the right of relator to have the tax estimated and collected was taken away by the Acts Nos. 3 and 55 of 1874, and the Supreme Court of Louisiana erred in affirming his judgment, if the affirmance can be based on this ground. As to the right of the relator and the duty of the respondent, these Acts of 1874 are precisely as if they had never been written. Von Hoffman vs. Quincy, 4 Wallace, 535; Woodruff vs. Trapnall, 10 Howard, 190; Hartman vs. Greenhow, 102 U. S. 672; Louisiana vs. Pilsbury, 105 U. S. 301, and cases cited; Walker vs. Whitehead, 16 Wallace, 314.

IV.

For the same reasons and upon the same authority, the lower court erred in holding that the grant of State aid was repealed by the same Acts of 1874, in such way as to take away the right claimed herein by the relator and abolish the duty imposed on the respondent. And the Supreme Court of Louisiana erred in affirming its judgment, if the affirmance is based on this ground. Walker vs. Whitehead, 16 Wallace, 314; Von Hoffman vs. Quincy, 4 Wallace, 535.

V.

The lower court erred in holding that the power and duty of the Auditor in the premises were taken away by Articles 202 and 209 of the Constitution of 1879, restricting the rate of taxation, and the Supreme Court of Louisiana erred in affirming the judgment, if the affirmance be based on this ground. The doctrine is established and familiar, that as to the contract rights of relator acquired in 1871 under bonds issued in 1869 and 1870, no provision of the Constitution of 1879 can have any legal effect to impair the same. White vs. Hart, 13 Wallace, 646; Von Hoffman vs. Quincy, 4 Wallace, 530; Hartman vs. Greenhow, 102 U. S. 672; Louisiana vs. Pilsbury, 105 U. S. 300; Wolf vs. New Orleans, 103 U. S. 358; State vs. New Orleans, 34 An. 1149; 36 An. 687.

VI.

The lower court erred in declaring that in the causes No. 6939 of the Supreme Court of Louisiana, and No. 203 of the Supreme Court of the United States (105 U. S. 622), such decisions were rendered as preclude the relief demanded by relator in this case. And the Supreme Court of Louisiana erred in affirming the judgment, if such affirmance rest on this point. That controversy, which was taken by writ of error to the Supreme Court of the United States, was a proceeding to fund the bonds under the régime offered by the Act No. 3 of 1874, and the Act No. 5 of 1875, Extra Session. The State Court declared that the plaintiff in that suit, the present relator, had not brought his bonds within the narrow limits set up in the offer which the State made to fund. It had not established the conditions upon which the State had proffered an exchange of bonds. It had not shown that its bonds were in the class which the State had determined to include in its funding scheme. The plaintiff had contended that, under the long line of authorities, from Knox County vs. Aspinwall, 21 Howard, 545, down to Town of Coloma vs. Eaves, 92 U. S. 487, there being power to issue the bonds, and the exercise of that power being recited on them, it was presumed in favor of the *bona fide* holder for value that all conditions precedent to the issue had been complied with, that this presumption was conclusive, and not disputable, and was a contract right belonging to such third holder, and that Act No. 5 of 1875, Extra Session, was, as to such third holder, null and void, because it impaired such contract right. The Supreme Court of Louisiana was careful to say, in its opinion through Mr. Justice Egan, referring to the plaintiff's objection to any evidence by the Funding Board of any defects in the work on the canal or other irregularities in the issue of the bonds:

> "The authorities cited on behalf of the plaintiff, and other adjudications of this Court, not cited, sustain this position so far as relates to ordinary actions, and were this one for the recovery of the amount of the bonds in question, we should not hesitate to rule accordingly."

Again, referring to the peculiar character of the action under the Act No. 5 of 1875, this Court said:

> "The plaintiffs are not here asserting, in an ordinary action upon the bonds, the right to recover their amount. They are asking to remove a cloud of suspicion which attaches to their bonds, in order that they may accept the offer of consolidated bonds made by the State to its creditors."

In short, that case was a mere inquiry as to whether, in the hands of Canal Company, the bonds belonged to a class that could be funded. The State had offered to fund on certain terms, and funding could be demanded only on such terms.

On writ of error, the Supreme Court of the United States, through its Chief Justice, said that the petition of the plaintiff to fund "got in due course of procedure to the Supreme Court of the State, and it was there decided that the suit thus begun was not one for the recovery of the money due on the bonds, but was rather in the nature of an inquisition to determine whether the bonds in question were of a class which the State had determined to include in its funding scheme. For this reason the Court held that, *for the purposes of such an inquiry* the petitioner, as a *bona fide* holder, occupied no better position than the first taker. Because of this ruling the present writ of error has been brought by the Company."

The Court then proceeded to declare that the Act No. 11 of 1875, as thus applied, did not contravene the Constitution of the United States, as it did not impair the obligation of the original contract, and was careful to say:

> "The obligation of the State to pay the bonds in money to the *bona fide* holders, in accordance with the original promise, still remains. The judgment which has been rendered, and which we are now reviewing, *is no bar to any proper proceeding for that purpose.* The suit which was authorized, and the suit which was actually begun, only related to the right of the holder to come into the compromise which the State offered to certain classes of its creditors. The judgment is, that the bonds do not belong to any of the designated classes. The question here is, not whether if that inquiry were open to us, we should be of the same opinion, but whether the obligation the State is under to the Company has been impaired by Act No. 11 of 1875, as thus construed. We think the State had a right to say, when it proposed a scheme for the compromise of its debts, what creditors should be included. That, in our opinion, is all that has been done." 105 U. S. 625.

It is evident, then, that the decisions in that case cannot affect this. It was plain in that case that the plaintiff, the Guaranty Company, was eminently a *bona fide* holder for value, and before maturity, and that the large sum it advanced on the bonds had been expended in one way or another on the work. This was not disputed by the Funding Board, as the record will show, and was conceded by the Court. And it was in view of this that the Supreme Courts of Louisiana, and of the United States, were so careful to justify their position by pointing out the peculiarity of the proceeding, and the fact that the *bona fide* holder still had the same rights he always had in any proper proceeding to enforce payment of the bonds, and, of course, of the coupons.

VII.

There is no force in the point suggested in the supplemental answer of respondent, that the Act No. 116 of 1869 is invalid, because it does not provide adequate means for the fulfilment of the obligation. As to this it may be remarked, if a point be urged here, which has plainly been abandoned below,—

(1) It is a very singular idea that, in reply to an application for a remedy for the enforcement of the obligation, the Auditor should answer that the means are inadequate. He is required by the Section 7 to estimate and collect a sufficient sum. When he does this and the amount is collected, he will not be apt to hear any complaint that it is insufficient.

(2) The fact is, that the means provided are unusually numerous; being—

a. A mortgage on all the property to the State; §3.

b. A provision that the Canal Company should make deposits with the State Treasurer, for interest; §4.

c. A deposit of tolls to sink the principal.

d. A special tax, under the 7th Section, to provide for all possible deficiencies in the foregoing.

It further appears that, two days before, the Legislature had adopted the Act No. 66 of 1869, providing a special tax for the interest on all bonds of the State.

The Supreme Court of La. has decided several issues of bonds to be valid, where the means were not nearly so adequate; for example, the levee bonds under Act No. 35, of 1865, in case of 'State vs. Clinton, 28 An. 219, where the only provision was a pledge of proceeds of swamp lands; the levee bonds of 1870, where the tax, as matter of history, was not large enough to pay the principal and interest in the five years those bonds had to run, 29 An. 690; the railroad bonds in Hamlin vs. Board, 30 An. 443, where there was no provision for the principal, save the stock subscribed for and its dividends, which *afterwards* turned out to be worthless.

The means provided in the Act No. 116 of 1869, are more ample and varied than any of the above. As was said in State vs. R. R. Co., 25 An. 70, the Art. 111 of Constitution of 1868, gave "a latitudinous discretion to the Legislature." Naturally. They are to decide what are adequate ways and means—who else can decide? Is it rational to call on capitalists to give their good money for bonds, if, fifteen years after, they are to be called on to contest this question, and then to be condemned, because the State herself has not enforced the means provided? Is it fair to prophesy after the fact, and say that the ways and means which then seemed adequate now appear too small? Such a construction proves too much, and therefore proves nothing. It proves that under the Article 111, no valid bond could ever be issued or safely bought, for, under any law, means which seemed to the Legislature ample, might in lapse of time shrink into inadequacy.

VIII.

Each bond in this case recites that it is issued "to aid in the construction of the Mississippi and Mexican Gulf Ship Canal," and declares on its face that "for the principal and accuring interest on this bond, the faith and credit of the State of Louisiana are pledged by Act of the General Assembly, No. 116, approved March 8th, 1869, and which Act is published in full on the reverse hereof." And this Act in §2 declares that "for the payment of the principal and interest of the bonds, the faith of the State is unconditionally pledged to the holder."

These are recitals whose effect cannot be doubtful. In Mercer Co. vs. Hacket, 1 Wallace, 83, 84, it was decided of similar recitals that they operated a complete estoppel in favor of the *bona fide* purchaser for value, and it was "no defense to the claim of such a holder that the act of legislation referred to on the face of the bonds, authorized the county to issue the bonds only and subject to certain restrictions, limitations and conditions, which had not been formally complied with; nor that the bonds were sold at less than par ~~upon~~ when the Act authorizing their issue, and referred to by date on the face of the instrument, declared that they should in no case, nor under any pretense, be so sold."

The rule laid down in that case has been followed repeatedly by the Supreme Court of the U. S. down to the present day. Meyer vs. Muscatine, 1 Wallace, at p. 393; Grand Chute vs. Winegar, 15 Wallace, 355; Anderson County vs. Beal, 113 U. S. 227; Town of Coloma vs. Eaves, 92 U. S. 487.

It is plain, then, on principle and authority, that when public officers are endowed with power to issue bonds and exercise that power by issuing such obligations, which purport on their face a compliance with the law, the presumption of regularity in favor of the *bona fide* holder is conclusive. Such officers have decided the question. The matter has passed into judgment. 92 U. S. 487. As to the relator the bonds are unquestionable. It results that the relator has a right to the mandamus; and we contend that the State enactments which have sought to take away this right, and all right and remedy, are null and void, and produce no effect as against relator. In other words, the right to mandamus remains because the attempt to take it away is in violation of the Constitution of the United States.

And the question now and here is: Whether this Court, under the Constitution and laws of the United States, has not the power to reverse the decision of the Louisiana Court on the errors assigned, and whether that power should not be exercised in the premises. In other words, will not this Court, as it did in Gunn vs. Barry, 15 Wallace, 610, remand the case to the Supreme Court of the State with directions to that tribunal to enter a judgment of reversal, to reverse the judgment of the court of first instance and thereafter to proceed in accordance with your opinion?

In Edwards vs. Kearsey, 96 U. S. 595, 607, this Court said:

> "The remedy subsisting in a State when and where a contract is made and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the Constitution and is, therefore, VOID."

It will not be disputed that the remedy by mandamus against the Auditor of Louisiana has existed since, at least, 1826, when the Code of Practice was adopted, and that it is the sole remedy to compel him to perform "the duties attached to his office."

By the Code of Practice of 1826, as well as by its revision of 1870—there being no change in this respect—the following provisions, among others, were established, and are still in force as to mandamus:

> " ART. 830. The object of this order is to prevent a denial of justice or the consequence of defective police, and it should therefore be issued in all cases where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong, or an abuse of any nature whatever.
>
> " ART. 834. It may be directed to *public officers* to compel them to fulfil *any* of the duties attached to their office, or which may be legally required of them.
>
> " ART. 840. The party wishing to obtain an order in any of the cases mentioned in this paragraph must apply to any competent tribunal by petition, stating the nature of his right, or of the injury he sustains, or of the denial of justice which he experiences, and shall make oath of the truth of the facts thus alleged.
>
> " ART. 842. If, on the day assigned for answering the order, the party or judge to whom it is directed answers, and states sufficient reason to justify his conduct, the complaint shall be dismissed, and the petitioner sentenced to pay costs.
>
> " ART. 843. But if the answer is considered insufficient, then a peremptory mandate shall issue, ordering the party, or inferior judge, to do what has been demanded of him; and if he does not obey, an order of arrest shall issue, and he shall be imprisoned until he has rendered obedience to the mandate."

And the proceeding does not even abate by the retirement of citals that they operated a complete estoppel in favor of the *bona fide* purchaser for value, and it was "no defense to the claim of such a holder that the act of legislation referred to on the face of the bonds, authorized the county to issue the bonds only and subject to certain restrictions, limitations and conditions, which had not been formally complied with; nor that the bonds were sold at less than par ~~upon~~ when the Act authorizing their issue, and referred to by date on the face of the instrument, declared that they should in no case, nor under any pretense, be so sold."

The rule laid down in that case has been followed repeatedly by the Supreme Court of the U. S. down to the present day. Meyer vs. Muscatine, 1 Wallace, at p. 393; Grand Chute vs. Winegar, 15 Wallace, 355; Anderson County vs. Beal, 113 U. S. 227; Town of Coloma vs. Eaves, 92 U. S. 487.

It is plain, then, on principle and authority, that when public officers are endowed with power to issue bonds and exercise that power by issuing such obligations, which purport on their face a compliance with the law, the presumption of regularity in favor of the *bona fide* holder is conclusive. Such officers have decided the question. The matter has passed into judgment. 92 U. S. 487. As to the relator the bonds are unquestionable. It results that the relator has a right to the mandamus; and we contend that the State enactments which have sought to take away this right, and all right and remedy, are null and void, and produce no effect as against relator. In other words, the right to mandamus remains because the attempt to take it away is in violation of the Constitution of the United States.

And the question now and here is: Whether this Court, under the Constitution and laws of the United States, has not the power to reverse the decision of the Louisiana Court on the errors assigned, and whether that power should not be exercised in the premises. In other words, will not this Court, as it did in Gunn vs. Barry, 15 Wallace, 610, remand the case to the Supreme Court of the State with directions to that tribunal to enter a judgment of reversal, to reverse the judgment of the court of first instance and thereafter to proceed in accordance with your opinion?

In Edwards vs. Kearsey, 96 U. S. 595, 607, this Court said:

> "The remedy subsisting in a State when and where a contract is made and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the Constitution and is, therefore, VOID."

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And the proceeding does not even abate by the retirement of the officer, but binds his successor. State vs. New Orleans, 35 An. 68.

This remedy by mandamus, as against the Auditor of Public Accounts, has been enforced by the Supreme Court of Louisiana in the following cases, among many others, and at the following dates:

State vs. Bordelon, 6 An. 68. February, 1851.

Parker vs. Robertson, 14 An. 249. April, 1859.

State *ex rel.* Collens vs. Jumel, 30 An. 861. April, 1878.

State *ex rel.* Campbell vs. Steele, 37 An. 353. April, 1885.

These decisions cover all the time before and after the issue of our bonds, which it is needful to consider. Similar process has for many years been employed and is still freely used against the State Treasurer, and officers of similar degree.

State vs. Burke, 33 An. 969; State vs. Secretary of State, 32 An. 579.

It is impossible to examine these cases carefully without being struck with the errors and inconsistencies of the judgment of of which we now complain.

In State vs. Bordelon, the right was denied by the respondent on the ground that there was no specific appropriation, and the Court took up that question and decided that there was.

In Parker vs. Robertson, the *liability of the State* for the sheriff's fees was denied, and the Court took up and decided that question in favor of the relator. 14 An. 249.

In State ex rel. Collens vs. Jumel, cited above, Mr. Collens, who had been a Judge of the Seventh District Court, whose court had been abolished by an Act of the Legislature, and who had been practically put out of possession of his office in 1872, "held himself in readiness to perform its duties and refrained from the practice of his profession." 30 An. 862. He brought the mandamus to enforce the right to salary from April 1st, 1873, to November 1st, 1876, some $18,000. The point was made, as in this case, of the "sovereignty of the State" and the want of jurisdiction or power in the Court to give the relief; and the Court said, in reply to the question, "Can the relator sue to recover his salary in this form of action?"

> "The State is sovereign and cannot be sued by her citizens in her own courts without her permission; but a civil proceeding, by which one officer of the State seeks to compel another officer of the same State to perform a ministerial duty is *not* in the proper sense of the word a suit against the State. Nothing is more common than for a party who has a claim against a State, whether for salary as an officer, *or for money due on other accounts*, to have his right to payment *adjudicated* through and by means of a mandamus against the auditing officer. It is recognized by us *continually* as a legitimate mode of ascertaining what are the rights of persons who have, *or who prefer*, claims against the State. And to say that none but an officer of the State can lawfully claim a salary from her, and that the relator cannot claim it because his office is abolished, would be to assume in the outset as established, the very thing which is the *gist of the controversy.*"

That this was not a hasty decision is shown by the fact that one of the five Judges dissented on this very point, p. 866, in the following words:

> "In this instance we are called upon not merely to coerce the performance of a pre-existing duty, not merely to enforce an acknowledged, an ascertained right, but to condemn the State on a suit brought not against it, but in its name, to pay a disputed claim. This, I believe, we cannot do on a proceeding directed against the Auditor alone. * * * Is that salary due? It may be due, but that is a fact which should be judicially ascertained in an authorized action against the State."

This decision has never been overruled so far as can be discovered. It is the law of Louisiana, announced by a tribunal which, as history shows, made claim to specially represent her highest intelligence. See eulogies on the organ of the Court, 39 Annual, VII. It is conclusive in our favor that the right of the relator to the mandamus it prays for cannot be denied on the ground that we are urging a claim against the State and that the State is not a party. There cannot be one law for Judge Collens and another for the Guaranty and Indemnity Company. It shows that the true ground of denial is to be found in the unconstitutional enactments subsequent to 1871, which sought to take away our contract rights; which are null and void; which will be treated as if they were not written, and as if they were simply evil imaginings which had never ultimated into manuscript or type. Fletcher vs. Peck, 6 Cranch, 87; Van Hoffman vs. Quincy, 4 Wall. 535; Butz vs. Muscatine, 8 Wall. 575; Gunn vs. Barry, *supra;* Edwards vs. Kearsey, *supra.*

In the case of Collens, *supra*, it will be observed that the Court declared that the remedy by mandamus, codified as we have seen in 1826, and enforced at the dates we have quoted, "has been recognized continually," "as a legitimate mode of ascertaining what are the rights of persons who have, or who prefer, claims against the State" of Louisiana. It is obviously the sole remedy for such purpose. It has been declared to be wider in scope and deeper in reach than it is at common law. State vs. Secretary of State, 32 An. 579.

The attempt then to take away this sole remedy *in toto* is the more glaring in its character, when the remedy was being continually recognized as legitimate. It is worse, if possible, than the attempt in Iowa to change an existing jurisprudence under which bonds had been purchased, an attempt which this Court disregarded as a mere nullity. Gelpcke vs. Dubuque, 1 Wall. 175; Havermeyer vs. Iowa Co., 3 *Id.* 294, 303.

The case of State vs. Burke, 33 An. 498, like the case of Louisiana vs. Jumel, 107 U. S. 711, hereinafter noticed, was an attempt to deal with a sum of money already in the State Treasury, and does not apply against us. But, if it seems to ignore the case of Collens, this cannot change the fact upon which we insist of a remedy and jurisprudence existing when we bought our bonds, and sought to be taken away by enactments which are, in a legal aspect, as if never written.

Nor does such a case bind this Court at all in considering the Federal questions now laid before it.

It is plain that the Eleventh Amendment to the Constitution of the United States can have no bearing against us on this writ of error. The writ of error in this cause is not a suit against the State of Louisiana forbidden by such Amendment. In Cohens vs. Virginia, 6 Wheaton, 264, it was declared, once for all, that writs of error might be taken against a State or against the United States for the purpose of revising, and if need be reversing a judgment when the Constitution and laws of the United States give appellate jurisdiction. The Court said:

> "Under the Judiciary Act the effect of a writ of error is simply to bring the record into court and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act on the parties. It acts only on the record. It removes the record into the supervising tribunal."

The case at bar differs in some respects from Cohens vs. Virginia, but the above principle applies to both. The Eleventh Amendment offers no obstacle to the decision of our case on the merits of the Federal questions presented.

The cases of Louisiana vs. Jumel and Elliott vs. Wiltz, 107 U. S. 712, cited by the Supreme Court of Louisiana, are, we submit, not in point against our contention. The question there was whether the United Circuit Court could deal by mandamus and injunction with a specific sum of money in the treasury of the State, which was the property of the State, held by her officers, not in trust for her creditors nor as their agents, but as her servants, and could as to this specific sum control them in the administration of her finances and thus oust the jurisdiction of the political power of the State.

The art of judging consists very largely in the drawing of logical distinctions. It is easy to see the line which separates our case from those in 107 U. S. Our suit was begun and carried on in a State Court; we did not seek to deal with a specific sum in the Treasury; our right of action was, beyond doubt, existent when we acquired our bonds; it was obviously our only remedy. The duty of the Auditor is plain, mathematical, clerical and ministerial. We do not seek to deal with a fund in the Treasury—the property of the State; our remedy has been taken away *in toto* by the enactments complained of, but still exists, because those enactments are null and void, and in legal contemplation have never been adopted.

If, in Gunn vs. Barry, 15 Wall. 610, a provision of the Constitution of Georgia, which undertook to violate a contract by enacting that no court or ministerial officer in that State shall ever have jurisdiction or authority to enforce it on the property named, was declared null and void, and the judgment of the Supreme Court of Georgia reversed, and the case sent back, why should not a similar result be reached in this cause? You there told the Supreme Court of Georgia to proceed according to law, and direct a mandamus to issue to Sheriff Barry, compelling him to do what the so-called constitutional mandate prohibited him from doing. We are unable to see why that case is not full authority for all we ask here.

The decision in Bank vs. Arkansas, 20 Howard, 530, is not against us.

That case was a suit against the State, and the only complaint was of a change in a rule of practice. Nor does it appear that the bonds there involved were acquired on the faith of a right and remedy as in our case. In any event there was no attempt to take away all remedy.

The case of Haygood vs. Southern, 117 U. S. 65, cited by the other side, is not against us. That was a bill in equity filed in the United States Circuit Court against State officers and fell within the prohibitions of the XIth Amendment. But, as we have seen, that Amendment does not touch the case at bar.

The same may be said of the case In re Ayers, 123 U. S. 443, also cited against us. That was a proceeding in the Federal Court which grew out of a suit in equity in the Federal Court. The suit was held to conflict with the XIth Amendment; and such cannot be said of the case at bar.

We ask the Court to rule that the enactments of Louisiana, which took away all remedy for the enforcement of our contract rights were and are null, void and impotent, and to reverse the judgment complained of and remand the cause, with directions similar to those given in Gunn vs. Barry, in 15th Wallace, and for such other order and judgment as may be just in the premises.

Respectfully submitted,

W. W. HOWE,

Of Counsel for Relator, Plaintiff in Error.

DECEMBER, 1889.

APPENDIX.

[COPY OF BOND.]

(Filed in the Civil District Court for the Parish of Orleans, March 13th, 1885)

UNITED STATES OF AMERICA.

C. No. 192.

$1,000. $1,000.

STATE BOND TO AID IN THE CONSTRUCTION OF THE MISSISSIPPI AND MEXICAN GULF CANAL.

IT IS HEREBY CERTIFIED THAT THE STATE OF LOUISIANA will pay to bearer the sum of ONE THOUSAND DOLLARS, which sum the said State of Louisiana agrees to pay in current money of the United States, at the Office of the State Treasury, to the said bearer, in thirty years from the date hereof, with interest at the rate of 7 3-10 per cent. per annum, payable semi-annually, on the 1st day of March, and 1st day of September, of each year, on the delivery of the interest coupons attached, at the Office of the State Treasurer. For the principal and accruing interest on this Bond, the faith and credit of the State of Louisiana are pledged, by Act of the General Assembly, No. 116, approved March 8th, 1869, and which Act is published in full on the reverse hereof.

IN TESTIMONY WHEREOF, the Seal of the State is hereunto affixed, and the signatures of the Governor and Secretary of State written in their own hands, this first day of March, 1869.

(Original signed):

GEO. E. BOVEE, H. C. WARMOTH,
Secretary of State. Governor.
[SEAL]

Endorsed in blank.

(Signed) CYRUS BUSSEY, Treasurer.
(Signed) JAMES O. NOYES, President.

Fifty-one (51) Coupons attached, maturing from March 1st, 1874, to March 1st, 1899.

The Coupons attached to said Bond No. 192 are numbered from 10 to 60.

[FORM OF COUPON].

No. 10. $36.50.

THE STATE OF LOUISIANA

Will pay to bearer thirty-six dollars and fifty cents, at the Office of the State Treasurer, or in the City of New York, at the option of the holder, being six months' interest due March 1st, 1874, on Bond No.   for one thousand dollars.

(Signed) ANT. DUBUCLET,
Treasurer.

[ACT PRINTED ON REVERSE OF BOND.]

AN ACT (PROVIDING STATE AID, ETC.)

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That the Governor of this State is hereby authorized and directed to issue the bonds of this State to the Mississippi and Mexican Gulf Ship Canal Company, in aid of the said Canal Company, to an amount which shall not exceed six hundred thousand dollars, under the following conditions, viz.:

When the said Mississippi and Mexican Gulf Ship Canal Company, beginning at the mouth of Bayou Dupres, on the shore of Lake Borgne, shall have completed the proposed canal for a distance of one mile to the depth of ten feet at ordinary stage of water, with a width of seventy feet at the top and forty feet at the bottom, either by excavating on a new line or by widening, straightening and deepening the channel of Bayou Dupres, then, upon the certificate of the State Engineer, or of any one of the engineers of the Board of Public Works selected by the Governor of the State, that the said work has been done as above provided, the Governor of this State is hereby authorized and directed to issue the bonds of the State to the amount of one hundred and twenty thousand dollars, according to the provisions of this Act. That when the said Company shall have completed the second, third and fourth miles of said work, to the width and depth of the first mile, so as to form a continuous canal, then, upon the certificate of the engineer, as above provided, that the second, third and fourth miles are so completed, each certificate being given on the completion of each of said miles, the Governor is hereby authorized to issue to said Company, under the provisions of this Act, on the completion of each of the three said miles, the bonds of this State to the amount of one hundred and twenty thousand dollars. That when the said Canal Company shall have entirely completed the said Canal to the width and depth above specified, with a good and substantial lock at least three hundred feet long and eighty feet wide, so as to afford navigation at ordinary stage of water in Lake Borgne, from the Mississippi River into Lake Borgne, then, upon the certificate of the engineer, as above provided, that the work is so far finished, the Governor of this State is hereby authorized and directed to issue the bonds of the State to the amount of one hundred and twenty thousand dollars ($120,000), making the total of six hundred thousand dollars ($600,000).

SEC. 2. *Be it further enacted, etc.*, That the bonds of the State issued under the provisions of this Act shall be signed by the Governor of the State and countersigned by the Secretary of State, and sealed with the seal of the State, to an amount not to exceed six hundred thousand dollars, payable in thirty years, and bearing interest, payable semi-annually, at the rate of seven and three-tenths per cent. per annum. The said bonds shall be registered in the books of the Treasurer of the State; shall be dated on the first day of March, one thousand eight hundred and sixty-nine; shall be made in sums of one thousand dollars; shall be payable to to bearer, and shall have interest coupons attached, payable in New Orleans or in the City of New York at the option of the holder, on the first of March and first of September of each year, which said interest coupons shall be signed and stamped by the Treasurer of the State. For the payment of the principal and interest of the bonds, the faith of the State is unconditionally pledged to the holder. When the bonds of the State are issued to the Mississippi and Mexican Gulf Ship Canal Company, in accordance with the conditions set forth in the first Section of this Act, the said bonds shall be made transferable by the endorsement of the President and Treasurer of the Board of Directors of said Company.

SEC. 3. *Be it further enacted, etc.*, That the said Canal, with all its appurtenances, fixtures and lands acquired, either by purchase or grant, shall be and are hereby mortgaged and hypothecated to the State of Louisiana, with the force and effect of a first mortgage, for the full and final payment of bonds issued, together with the interest thereon, at the rate of seven and three-tenths per cent. per annum.

SEC. 4. *Be it further enacted, etc.*, That the said Canal Company shall, on or before the maturity of any of the interest coupons on any of said bonds, deposit the amount thereof in the State Treasury for the payment of the same, and in event of the failure of said Canal Company to make such deposits for the payment of the interest coupons on any bonds so issued to them, then the State shall have the right to foreclose the mortgage herein given to secure the payment of the bonds and interest issued to said Company according to the provisions of this Act.

SEC. 5. *Be it further enacted, etc.*, That the said Canal Company are hereby bound to expend the entire proceeds realized from the sale or hypothecation of the bonds so issued in the opening of said Canal, including the purchase of such adjacent lands as may be deemed desirable by the said Company, the construction of a lock, drawbridge, etc., and should the Company at any time fail to so appropriate the said proceeds, but divert them to objects foreign to the said Canal, the said Company shall then forfeit their charter and franchises hereby, and the State shall be authorized to foreclose the mortgage herein given upon the said Canal, its lands, fixtures and appurtenances.

SEC. 6. *Be it further enacted, etc.*, That after the said Canal shall have been opened to the width of seventy feet and of sufficient depth to permit the passage of vessels drawing ten feet of water, at least one-half of the proceeds of said Canal shall be applied to the widening of said Canal to at least one hundred feet, through its entire length from the Mississippi to Lake Borgne, and that in and after the year 1879 (one thousand eight hundred and seventy-nine), at least thirty thousand dollars of the net proceeds of said Canal, and the entire net proceeds, in case they do not amount to thirty thousand dollars, shall be annually paid into the Treasury of the State, in liquidation of the State bonds, the interest upon the amounts so paid is to offset the interest upon an equal amount in State bonds, due from the said Canal Company, the said payments to be made each and every year, until the sum of six hundred thousand dollars shall have been paid into the State Treasury by the said Canal Company, or so much of said sum as shall fully liquidate its indebtedness to the State.

SEC. 7. *Be it further enacted, etc.,* That in order to provide a fund for the semi-annual payment of interest upon the bonds issued in accordance with this Act and the final redemption of said bonds, should the Mississippi and Mexican Gulf Ship Canal Company fail to meet the obligations set forth in the fourth and sixth Sections of this Act, when the deficit in interest to the year 1879 (one thousand eight hundred and seventy-nine), or the deficit and the annual instalment of thirty thousand dollars ($30,000) from that date to the final redemption of said bonds shall have reached the sum of one hundred thousand dolllars ($100,000), and as often thereafter as the said deficit shall have reached that sum, the Auditor is hereby directed to determine, by accurate calculation, what rate of taxation on the total assessed value of all movable and immovable property in the State, will be sufficient for the purpose of paying said deficit in interest or annual instalments, or both, and it shall also be his duty to notify the several sheriffs and tax-collectors of the rate of taxation as ascertained and fixed for the purpose aforesaid, and said tax, as ascertained and fixed, is hereby levied upon all the movable and immovable property that may be assessed in this State; and it shall be the duty of the several sheriffs and tax-collectors to collect said tax, and the collection of the same shall be enforced as the law provides, or may hereafter provide. for the collection of taxes.

SEC. 8. *Be it further enacted, etc.,* That the said Canal Company shall not be permitted to charge more than twenty cents per ton of the registered tonnage upon steamboats, barges, sailing vessels, or vessels of any description passing through the said canal, over and above the cost of towage, and that said Corporation is hereby authorized to avail itself of the provisions of the general expropriation law of Louisiana, approved February twenty-eight (28), 1855 (eighteen hundred and fifty-five).

(Signed) CHAS. W. LOWELL, Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN, Lieutenant-Governor and President of the Senate.

(Signed) H. C. WARMOTH, Governor of the State of Louisiana.

Approved March 8, 1869.

(Signed) GEO. E. BOVEE, Secretary of State.

No. 3.]

AN ACT

To provide for funding obligations of the State by exchange for bonds; to provide for principal and interest of said bonds; to establish a Board of Liquidation; to authorize certain judicial proceedings against it; to define and punish violations of this Act; to prohibit certain officers diverting funds except as provided by law, and to punish violations therefor; to levy a continuing tax and provide a continuing appropriation for said bonds; to make a contract between the State and holders of said bonds; to prohibit injunctions in certain cases; to limit the indebtedness of the State and to limit State taxes; to annul certain grants of State aid; to prohibit the modification, novation or extension of any contract heretofore made for State aid; to provide for the receipt of certain warrants for certain taxes, and to repeal all conflicting laws.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That for the purpose of consolidating and reducing the floating and bonded debt of the State, the Governor, Lieutenant-Governor, Auditor, Treasurer, Secretary of State and Speaker of the House of Representatives, are hereby authorized to cause to be prepared and to issue bonds, to be known as "Consolidated Bonds of the State of Louisiana," of the denominations of one hundred, five hundred and one thousand dollars, to the amount of fifteen millions of dollars, or so much thereof as may be necessary, all payable forty years from the first day of January, 1874, and all to be numbered consecutively, and made payable to bearer, and to bear interest at the rate of seven per cent. per annum, payable semi-annually in the City of New York and City of New Orleans, on the first day of July and January of each year, and coupons for such interest shall be annexed thereto; said interest and principal to be payable in lawful money of the United States.

SEC. 2. *Be it further enacted, etc.,* That the parties designated in the foregoing section shall constitute a Board of Liquidation, and a majority of said Board shall elect a fiscal agent for the State, who shall be a member of said Board.

SEC. 3. *Be it further enacted, etc.,* That the bonds authorized by Section one shall be signed by the Governor, Auditor and Secretary of State, and the coupons shall be signed by the Auditor and Treasurer; and when so prepared, said bonds shall be exchanged by the Board of Liquidation for all valid outstanding bonds of the State, and all valid warrants drawn previous to the passage of this Act by the respective Auditors of Public Accounts of the State on the Treasurer thereof, except warrants issued by the Auditor in payment of the Constitutional Officers of the State, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants; *provided*, that the holder of any bond or valid warrant rejected by a majority of said Board may apply by petition to the proper court for relief, and if final judgment shall be rendered in his favor against said Board, it shall be the duty of said Board to fund his said claim in bonds at the rate provided by this Act; and *provided further*, that if any member of said Board of Liquidation shall knowingly audit and fund any illegal claim against the State, he shall be deemed guilty of a misdemeanor, and shall, on conviction, be fined not less than five thousand dollars, and be imprisoned not less than two years, at the discretion of the Court. And any person knowingly procuring the same to be done, shall be subject to the same penalty.

SEC. 4. *Be it further enacted, etc.*, That the exchange of the bonds or valid warrants authorized by this Act shall be effected by said Board of Liquidation in the cities of New York and New Orleans.

SEC. 5. *Be it further enacted, etc.*, That the consolidated bonds herein authorized shall be held and used by said Board of Liquidation only for the purpose of exchange, as aforesaid; said bonds shall be used for no other purpose or purposes than as authorized by this Act, and any member of the Board of Liquidation using or attempting to use, or attempting to induce any person or persons to use, said bonds, or any of them, for any other purpose or purposes, shall, on conviction thereof, be punished by a fine of not less than five thousand dollars, and by imprisonment at hard labor for not less than one year.

SEC. 6. *Be it further enacted, etc.*, That notice of the adoption of this Act shall be published by said Board in one or more journals of New Orleans, New York, London, Paris and Amsterdam.

SEC. 7. *Be it further enacted, etc.*, That a tax of five and a half mills on the dollar of the assessed value of all real and personal property in the State is hereby annually levied, and shall be collected for the purpose of paying the principal and interest of the consolidated bonds herein authorized, and the revenue derived therefrom is hereby set apart and appropriated to that purpose and no other. And that it shall be deemed a felony for the fiscal agent or any officer of the State or Board of Liquidators to divert the said fund from its legitimate channel as provided, and upon conviction the said party shall be liable to imprisonment for not more than ten years nor less than two, at the discretion of the Court. If there shall, during any year, be a surplus arising from said tax, after paying all interest falling due in that year, such surplus shall be used for the purchase and retirement of bonds authorized by this act, said purchases to be made by the said Board of Liquidation, from the lowest offers, after due notice; *provided*, that the total tax for interest and all other State purposes, except the support of public schools, shall never hereafter exceed twelve and a half mills on the dollar. The interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest; and the said appropriation shall be a continuing annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the Auditor and Treasurer, and the said Board, respectively, to collect said tax annually, and pay interest and redeem the said bonds, until the same shall be fully discharged.

SEC. 8. *Be it further enacted, etc.*, That the bonds and valid warrants outstanding at the time of the passage of this Act, shall, as fast as they are received in exchange for consolidated bonds, be cancelled and destroyed by the said Board of Liquidation, and consolidated bonds purchased, as provided for in Section Seven of this Act, shall be cancelled and destroyed, after public notice has been given of the same in the official journal of the State, in the presence of as many citizens as may desire to be present, in like manner, and within ten days after such destruction, in each case, a proces verbal of the same shall be published and a report made to the General Assembly on the first Monday of every year, by said Board.

SEC. 9. *Be it further enacted, etc.*, That it shall be the duty of the Auditor, in his next annual report, to give a detailed account of the proceedings had under this Act, including the amount of new bonds issued, the amount of old bonds and valid warrants cancelled, the amount of the same outstanding, and the cost of the exchange, and annually thereafter, a full and exact statement of the condition of the public debt under the operations of this Act.

SEC. 10. *Be it further enacted, etc.*, That any judge, tax collector or any officer of this State, obstructing the execution of this Act, or any part of it, or failing to perform his official duty thereunder, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by imprisonment not exceeding five years, and by fine not exceeding two thousand dollars, at the discretion of the Court; *provided*, that this Section shall in no wise prejudice or affect the criminal proceeding under Section Five of this Act.

SEC. 11. *Be it further enacted, etc.*, That each provision of this Act shall be, and is hereby declared to be, a contract between the State of Louisiana and each and every holder of the bonds issued under this Act.

SEC. 12. *Be it further enacted, etc.*, That all grants of State aid heretofore made, whether of bonds, endorsements, subscription of stock or otherwise, which have become lapse or forfeited, be and the same are hereby repealed and annulled, nor shall the State hereafter modify, novate, or extend any contract heretofore made for the giving of State aid, in any form or under any pretext.

SEC. 13. *Be it further enacted, etc.*, That the entire State debt, prior to the year of our Lord nineteen hundred and fourteen, shall never be increased, directly or indirectly, beyond the sum of fifteen millions of dollars, hereby authorized, it being the intent and object of this Act, and of the exchanges to be effected thereunder, to reduce and restrict the whole indebtedness of the State to a sum not exceeding fifteen millions of dollars, and to agree with the holders of the consolidated bonds to be issued hereunder, that said indebtedness shall not be increased beyond said sum during said period.

SEC. 14. *Be it further enacted, etc.*, That any tax collector who shall turn over any money or warrants by him collected, to any person except to the State Treasurer, shall be deemed guilty of a misdemeanor, and shall, on conviction, be subject to the penalties prescribed in Section ten of this Act, and shall, in addition thereto, be liable in damages in double the amount so turned over; and any State officer requiring or demanding that said taxes shall be turned over to him, except the Treasurer of the State, shall be liable, on conviction, to the same penalties as are provided in this Section.

SEC. 15. *Be it further enacted, etc.*, That from and after the passage of this Act, until the first day of July, 1874, all valid Auditor's warrants issued for debts prior to January 1, 1874, shall be received for all back taxes, licenses and interest and penalties thereon, due prior to said first of January, 1884, except two mills for school fund, three mills for levee construction and repair fund, and two mills to the interest fund, for the purpose of paying any interest in arrears accruing on the bonded debt of the State prior to the passage of this Act.

SEC. 16. *Be it further enacted, etc.*, That no court or judge thereof shall have power to enjoin the payment of principal or interest of any bond issued under this Act, or the collection of the special tax therefor, or to enjoin any officer of State or parish in receiving warrants, as is prescribed in Section fifteen of this Act.

SEC. 17. *Be it further enacted, etc.*, That all acts or parts of acts in conflict with this Act, or any section thereof, are hereby declared to be repealed, and that this Act shall take effect from and after its passage.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.
(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved January 24, 1874.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:
P. G. DESLONDE.
Secretary of State.

No. 4.]

AN ACT

Proposing Amendments to the Constitution of the State of Louisiana.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened* (two-thirds of the members of each House agreeing thereto), That the following amendments be proposed and entered upon the respective journals of the Senate and House of Representatives, with the yeas and nays taken thereon, and the Secretary of State shall cause the same to be published three months before the next general election for representatives to the General Assembly, in at least one newspaper of every Parish of the State in which a newspaper shall be published. And said proposed amendments shall be submitted to the people at said election, in such manner and form that the people may vote for or against each amendment separately, *i. e.*: "first proposed amendment, for approval," or "against approval," and in like manner as to the others; and if a majority of the voters at said election shall approve or ratify such amendment or amendments, the same shall be appropriately numbered and become a part of the Constitution and be proclaimed as such by the Governor and Secretary of State.

PROPOSED AMENDMENTS TO THE CONSTITUTION.

No. 1. The issue of consolidated bonds authorized by the General Assembly of this State, at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the interest or principal thereof, or the levy and collection of the tax therefor; to secure such levy, collection and payment, the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds, shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the Treasury.

No. 2. Whenever the debt of the State shall have been reduced below twenty-five million dollars, the constitutional limit shall remain at the lowest point reached, beyond which the public debt shall not thereafter be increased; and this rule continue in operation until the debt is reduced to fifteen million dollars, beyond which it shall not be increased. Nor shall taxation for all State purposes, excepting the support of public schools, ever exceed twelve and a half mills on the dollar of the assessed valuation of the real and personal property in the State, except in case of war or invasion.

No. 3. The revenue of each year derived from taxation upon real, personal and mixed property or from licenses, shall be devoted solely to the expenses of the said year for which it shall be raised, excepting any surplus remain, which shall be directed to sinking the public debt. All appropriations and claims in excess of revenue shall be null and void, and the State shall in no manner provide for their payment.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.
(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved January 24, 1874.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy.
P. G. Deslonde,
Secretary of State.

No. 55.] AN ACT

Relative to the assessment and collection of State taxes imposed for the payment of the bonds of the State, and the principal and interest of the State debt by virtue of any law passed prior to January first, 1874, and to repeal all laws requiring or authorizing the Governor or Auditor or Treasurer to set apart funds in the State Treasury for the payment of any bonds issued by the State prior to January 1, 1874.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That hereafter no officer of the State shall have power or authority to assess, collect or enforce the payment of any tax for the payment of the principal and interest of the State debt, or for the payment of any bonds heretofore issued by the State or the interest thereon, the assessment or collection of which is not specially provided for and authorized by an act of the General Assembly passed since the first day of January, 1874; and no Court, judge, justice of the peace or other tribunal of the State shall entertain or have jurisdiction of any suit or proceeding to assess, collect or enforce the payment of any such tax; and no such tax shall constitute a lien or privilege on any property in the State, and no officer of this State shall register or record such tax as a lien or privilege or otherwise against any property within this State, and any such tax, though assessed and registered, shall not operate as a legal registration, and no lien shall result therefrom, and all penalties for the non-payment, and all interest for delay in payment of such tax, are hereby abrogated and released, and the bonds of the State tax collector shall not be deemed to cover the collection of any such tax, and the sureties on the bonds of the tax collectors shall not be liable for the sums collected on account of such tax, and the tax collectors are hereby relieved from making any settlements for such tax, and shall not be entitled to receive commissions for the collection thereof; *provided*, that the provisions of this Act shall not be construed to apply or to affect the collection of any taxes due to the State for any year prior to the year 1874.

SEC. 2. *Be it further enacted, etc.*, That neither the Governor, Auditor or Treasurer, shall have authority under any law passed prior to the first of January, 1874, to set apart any funds in the Treasury for the payment of the principal or interest of any bonds issued prior to the first of January, 1874; *provided*, that nothing in this Act shall be construed so as to interfere with or prevent the payment of any interest due on or prior to the first of January, 1874.

SEC. 3. *Be it further enacted, etc.*, That this Act shall take effect from its passage, and no court of this State shall have power or jurisdiction to arrest or impede its operation by mandamus, injunction or otherwise.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.
Approved March 14, 1874.
(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:
P. G. DESLONDE,
Secretary of State.

[ARTICLES FROM THE CONSTITUTION OF THE STATE OF LOUISIANA OF 1879.]

DISTRIBUTION OF POWERS.

ART. 14. The powers of the Government of the State of Louisiana shall be divided into three distinct departments, and each of them to be confined to a separate body of magistracy, to-wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another.

ART. 15. No one of these departments, nor any person or collection of persons holding office in one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

ART. 202. The taxing power may be exercised by the General Assembly for State purposes, and by parishes and municipal corporations, under authority granted to them by the General Assembly, for parish and municipal purposes.

ART. 209. The State tax on property for all purposes whatever, including expenses of Government, schools, levees and interest, shall not exceed, in any one year, six mills on the dollar of its assessed valuation, if the ordinance regarding the bonded debt of the State is adopted and ratified by the people; and if said ordinance is not adopted and ratified by the people, said State tax, for all purposes aforesaid, shall not exceed, in any one year, five mills on the dollar of the assessed valuation of the property; and no parish or municipal tax, for all purposes whatsoever, shall exceed ten mills on the dollar of valuation; *provided*, that, for the purpose of erecting and constructing public buildings, bridges and works of public improvements in parishes and municipalities, the rates of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the property taxpayers of such parish or municipality entitled to a vote under the election laws of the State, and a majority of same voting at such election, shall have voted therefor.

[ORDINANCE IN REGARD TO STATE DEBT.]

ARTICLE 1. *Be it Ordained by the People of the State of Louisiana in Convention Assembled*, That the interest to be paid on the consolidated bonds of the State of Louisiana be and is hereby fixed at two per cent. per annum for five years from the first of January, 1880, three per cent. per annum for fifteen years, and four per cent. per annum thereafter, payable semi-annually; and there shall be levied an annual tax sufficient for the full payment of said interest, not exceeding three mills, the limit of all State tax being hereby fixed at six mills; *provided*, the holders of consolidated bonds may, at their option, demand in exchange for the bonds held by them, bonds of the denomination of five dollars, one hundred dollars, five hundred dollars, one thousand dollars, to be issued at the rate of seventy-five cents on the dollar of bonds held and to be surrendered by such holders, the said new issue to bear interest at the rate of four per cent. per annum, payable semi-annually.

ART. 2. The holders of the consolidated bonds may at any time present their bonds to the Treasurer of the State, or to an agent to be appointed by the Governor—one in the City of New York and the other in the City of London—and the said Treasurer or agent, as the case may be, shall indorse or stamp thereon the words "interest reduced to two per cent. per annum for five years from January 1, 1880, three per cent. per annum for fifteen years, and four per cent. per annum thereafter;" *provided*, the holder or holders of said bonds may apply to the Treasurer for an exchange of bonds as provided in the preceding Article.

ART. 3. *Be it further ordained*, That the coupon of said consolidated bonds falling due the first of January, 1880, be and the same is hereby remitted, and any interest taxes collected to meet said coupon are hereby transferred to defray the expenses of the State Governor.

Be it further ordained, and it is hereby ordained by this Constitu-

tional Convention, That the foregoing provisions and articles relative to the consolidated debt shall not form a part of this Constitution, except as hereinafter provided, as follows:

At the election held for the ratification or rejection of this Constitution, it shall be lawful for each voter to have written or printed on his ballot the words, "For ordinance relative to State debt," or the words, "Against ordinance relative to State debt," and in the event that a majority of the ballots so cast have indorsed on them the words, "For ordinance relative to State debt," then the said foregoing provisions and articles of this ordinance shall form a part of the Constitution submitted, if the same is ratified; and if a majority of the votes so cast shall have indorsed on them the words, "Against ordinance relative to State debt," then said provisions and articles shall form no part of this Constitution.

LOUIS A. WILTZ,
President and Delegate from the Ninth Representative District
of the Parish of Orleans.
WM. H. HARRIS, Secretary.

Office Supreme Court U. S.
FILED
JAN 22 1890

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 140.

THE STATE OF LOUISIANA, EX REL. THE NEW YORK GUARANTY AND INDEMNITY COMPANY, PLAINTIFF IN ERROR,

vs.

O. B. STEELE, AUDITOR OF PUBLIC ACCOUNTS, SUBSTITUTED FOR ALLEN JUMEL.

SUPPLEMENTAL POINTS IN BEHALF OF PLAINTIFF IN ERROR.

The brief filed on behalf the defendant in error by the learned Attorney General of the State of Louisiana seeks to dispose of all the questions in this cause by asserting that they have been already adjudicated by this Court in Louisiana *vs.* Jumel and Elliott *vs.* Wiltz, 107 U. S., 712.

A further answer to the writ of error is attempted by the assertion that the bonds held by the relator have, after a full hearing, been adjudged invalid.

Both these points have been met in the main brief filed on behalf of the relator. A few additional remarks are respectfully submitted:

I.

The act of Louisiana (No. 116, of 1869) which created the bonds now held by the relator pledged the credit of the State for their payment, levied a tax to provide the means for meeting any deficit in the interest upon them, and directed the auditor to ascertain with accuracy the amount to be collected and then to notify the proper officers to make such collection.

If the act was still in force and no legislative or constitutional provision had ever been passed effecting its provisions, it is clear that mandamus would lie under the laws and practice of Louisiana to compel the State auditor to do the things which the act required and enjoined.

See the provisions of the code of Louisiana cited on Judge Howes' brief, p. 17, and the cases in the Louisiana courts cited on pages 18 and 19.

II.

The bonds held by the relator and the provisions of the act of 1869 providing for their security and payment constituted a contract between the State and the relator, and as a part of this contract a tax was levied and the proper officers of the State, who were by its laws charged with the duty of collecting a tax after it was levied, were directed to perform such duty whenever occasion should arise.

The contract was not that the State would levy the requisite tax from time to time to meet the recurring installments of interest as they should accrue, or do any further or future act to that end, but by an act *in presenti* and as a part of the contract, it made a complete exercise of its taxing power so far as to provide the means of making good any deficit which might ever exist.

As shown by the record, the State of Louisiana was not only the *primary* but the *sole* debtor and obligor in the bonds issued to the relator.

The bonds contained no promise or undertaking by the canal company to pay any money or to do any act.

Section 2 of act No. 116, of 1869, provides that when the bonds of the State were issued to the canal company according to the act they should be made transferable by the endorsement of the president and treasurer of the canal company, but this created no obligation on the part of the company to the holder of the bond. The canal company was bound to the State of Louisiana by the mortgage of the canal and all the property of the company for the full payment of all the bonds issued by the State, principal and interest, as provided by section 3 of the act, and also to provide, in advance, the amount due for the interest as it matured. (Section 4.)

The contract of the canal company with the State was to provide the money with which the State was to pay the interest on the bonds, and to meet any deficit in the provision so to be made by the company the levy was made in section 7 of the act. The State did not guarantee the interest. It made its direct, original promise to pay it, taking at the same time an engagement from the canal company to put it in funds for the payments as they should mature. It also, as a part of the contract with the bondholders, provided a certain method by which, in case of any deficit, the money should be forthcoming by means of the ministerial action of the subordinate officers of the State to carry into effect the levy made by the act.

III.

In Louisiana *vs.* Pilsbury, 105 U. S., 278 (October term, 1881), this Court held that the act of Louisiana No. 71, of 1852, creating the consolidated debt of New Orleans and containing a provision that the "common council of New

Orleans *shall* annually, in the month of January, *pass an ordinance* to raise the sum of six hundred thousand dollars by a special tax, to be called the consolidated bond tax, and the rate *per cent.* of said tax in each municipality shall be in proportion to the indebtedness of each," constituted a contract with the creditors, "an essential part whereof was the pledge to levy an annual tax of a specific amount for the payment of the principal and interest," (head note p. 278). The Court say:

"The State, in effect, said to them" (the creditors), "The city will give these bonds, running for the period designated and drawing interest, in exchange for your demands, and as security for the payment of interest and the gradual redemption of the principal the city shall annually, in January, levy a special tax for the purpose to the amount of $600,000. These provisions were designed to give value to the proposed bonds in the markets of the country, and, necessarily, as an inducement to the creditors to take them. When the bonds were issued and taken by the creditors a contract was consummated between them and the city as fully as if all the provisions had been embodied as express stipulations in the most formal instrument signed by the parties." (Pages 287, 288.) The right to a mandamus was accordingly upheld.

Later, in October term, 1883, in Louisiana *vs.* St. Martin's Parish, 111 U. S., 716, this Court again held that where a valid obligation is created by contract that taxes *shall* be *levied*, any "legislation repealing or modifying the taxing power so as to deprive the holder of the contract of all adequate and efficacious remedy is within the constitutional inhibition," and the decree of the State court refusing a mandamus was reversed with directions to "affirm the judgment of the third district court awarding the mandamus prayed" (p. 722).

The supreme court of Louisiana in 1885 accepted the decision of this Court in the St. Martin's Parish case last above cited, and in State *vs.* City of New Orleans, 37 La. Ann., 436, declared the doctrine as to the right of a creditor to a mandamus in a case of contract obligation in the precise language of the opinion of this Court (see 37 La. Ann., p. 440). They distinguished the case before them, but conceded the law as determined by this Court.

Before this, in 1884, the supreme court of Louisiana, in State *vs.* City of New Orleans, 34 La. Ann., 1149, had accepted the same doctrine and awarded a mandamus.

In the cases cited above, the contract, on the faith of which the creditors took the bonds, was that a tax *would be levied in the future.* In the case at bar the contract is not executory. It was executed by the provision of the act (No. 116, of 1869) whereby the tax *is levied,* and the contract obligation stood on the actual exercise of the taxing power of the State as a simultaneous act—not a promise of something to be done thereafter.

If the promise to levy a tax, as in the case of St. Martin's Parish, 111 U. S., 716 (*ubi supra*), constituted an inviolable contract, which could not afterwards be impaired by legislation contravening the rights it created, or destroying the remedy for their enforcement, *à fortiori* this cannot be done in the case of an executed contract, where the taxing power is actually exercised at the time of the making of the contract and as an integral part of the transaction between the contracting parties.

In Louisiana the supreme court. in State *ex rel.* Carriere *vs* New Orleans, 36 La. Ann., 687, has passed upon this very question. The proceeding was for a mandamus to enforce a right given in 1837, when the city taxing power was unlimited. Distinguishing the case before them from United States *vs.* Macon, 99 U. S., 582, where this Court refused to order a mandamus to enforce *new rights* not existing at the time of the contract, the supreme court of Louisiana say: " All we are asked to do is to bring into operation the power of taxation *existing at the date of the contract* and which under the Constitution of the United States, as consistently interpreted by its highest judicial expounder, *continues to exist as far as necessary for the enforcement of the obligations of that contract.*"

IV.

The jurisdiction and judgment of the Court now invoked by the plaintiff in error are not against the political or legislative power of the State of Louisiana. *That was exercised by the State itself in* 1869, of its own motion and sovereign will, in the very act by which the relator was induced to part with its money, and by which the State declared that a present cotemporaneous and simultaneous levy of a tax, sufficient, under its existing power of taxation, for the full protection of the bondholders, had been already made. Relying on this and with the act (No. 116, of 1869) spread upon the bond and thus "read into the contract," the relator paid its money. All that this Court is asked to do is to act upon the record brought up by the writ of error, and as in the St. Marion's Parish case (111 U. S., 716), to reverse the judgment below and remand the case for further proceedings.

The attempted repeal and invalidation of the contract rights of the relator by the acts of Louisiana and by the constitutional amendments subsequent to 1869 were wholly ineffectual to impair those rights.

This Court say in South Carolina *vs.* Gaillard, 101 U. S., 433, p. 437, "All the cases in this Court where the question has arisen agree in holding that the States may change the remedy, *provided no substantial right secured by the contract is impaired.*" In that case the repealed statute did not provide a remedy which formed a part of the contract. If, as in the case at bar, it had provided a remedy constituting a part of the contract a mandamus would have been allowed.

Antoni *vs.* Greenhow, 107 U. S., 769, does not militate against our contention. The opinion of the Court went upon the ground that the repealing act gave a new remedy substantially equivalent to that which it took away, and therefore did not impair the obligation of the contract to which it related.

This question alone was decided by the Court.

WILLIAM ALLEN BUTLER,
Of Counsel for Relator, Plaintiff in Error.

Office Supreme Court U. S.
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No. 140.

October term, 1889.

Supreme Court.

Of the United States.

THE STATE OF LOUISIANA EX REL. THE NEW YORK GUARANTY AND INDEMNITY COMPANY, PLAINTIFF IN ERROR,

versus

OLIVER B. STEELE, AUDITOR OF PUBLIC ACCOUNTS.

On Behalf of Defendant in Error.

W. H. ROGERS,
Attorney General.

E. MARCHAND, STATE PRINTER, 110 Chartres Street.

No. 140.

October term, 1889.

Supreme Court.

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THE STATE OF LOUISIANA EX REL.
THE NEW YORK GUARANTY AND
INDEMNITY COMPANY,
PLAINTIFF IN ERROR,

versus

OLIVER B. STEELE, AUDITOR OF PUBLIC ACCOUNTS.

On Behalf of Defendant in Error.

STATEMENT OF THE CASE.

Plaintiffs in error allege ownership of two hundred and fifty bonds of the State of Louisiana which had been issued under an act of the General Assembly, known as Act No. 116 of 1869, entitled "An Act providing State aid in the construction of the Mississippi and Mexican Gulf

Ship Island Canal and for the issue of State bonds therefor," approved March 8, 1869 These bonds are each for one thousand dollars, bearing 7 3–10 per cent per annum interest.

In 1874, a constitutional amendment was adopted authorizing an exchange of bonds. The condition for exchange was that the bonds were issued in strict conformity to law and not in violation of the Constitution of the State or of the United States and for a valid consideration." Act 11 of 1875, approved May 7, 1875.

The present plaintiffs brought suit maintaining the validity of their obligations and asking that they be funded and recognized as such valid obligations.

The judgment of the District Court was adverse to their claim, and this judgment was affirmed by the Supreme Court of the State, October, 1878, (Record p. 37). The decree of the Supreme Court was presented by writ of error to this Court and its judgment affirmed. 105 U. S. page 622.

Plaintiffs, ignoring the results of their former petitions and the several decrees therein, on February 14, 1884, applied for a writ of mandamus directed against the Auditor of the State to assess, levy and collect a tax sufficient to pay said bonds and interest.

The action was unsuccessful, and from a decree against them rendered by the Supreme Court in

1886 (R. p. 79), a writ of error is prosecuted to this Honorable Court.

ARGUMENT.

This is a suit directly against the State of Louisiana, which seeks to hold her liable on an alleged contract, without making her a party. The attempt here made differs in no manner from the principle established by this Court in Louisiana vs. Jumel and Elliott vs. Wiltz, 107 U. S. 712.

The Auditor is a purely ministerial officer of the Executive Department of the State and his powers and duties distinctly defined. He is entirely subordinate to the supreme political power of the State. And if a duty may be said to have been implied in his office by virtue of Sec· 7 of the Act of 1869, it has been revoked. (Constitution of the State Art. 209 and debt ordinances).

The assessment and levying of taxes may only be exercised by the Legislature. State Constitution, Art. 202.

And the Auditor being a part of the Executive Department is prohibited from usurping the functions of the legislative department. State Constitution, Arts. 14 and 15.

This high court is so familiar with the principles which assert themselves in every phase of position assumed by plaintiffs that a reference to the statutes of the State bearing upon the controversy seems superflous. All were thoroughly reviewed in Louisiana vs. Jumel. What was attempted in that case is attempted in this, i. e., to "require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question, until the bonds, principal and interest, were paid in full, and that, too, in a proceeding, in which the State was not and *could not be made a party*. It needs no argument to show that the political power cannot be thus evicted of its jurisdiction and the judiciary set up in its place.

And to same point we have Hagood vs. Southern, 117 U. S., pp. 66 and 67. Ex parte Ayers 123 U. S., p. 443.

Upon the other issue presented in this cause, it must be observed that the record shows this plaintiff was willing to accept sixty cents for every dollar of his claim and a reduced rate of interest under the Acts of 1874. True he was not bound to accept it, neither was he compelled to make the proposition to the State, neither was he bound to bring suit under the act. He could have held on to his bonds and awaited the "turning up" of something to his advantage. Suit was not absolutely essential to the funding and exchange—

only in questionable cases. He could not sue the State without her permission—and when he sued he accepted the terms of permission and concession made by her.

Recognizing the fact, if not the right, that his bonds were questioned, he brought suit and raised the direct issue of the *validity* of his bonds, and after a full hearing they were decided invalid.

He now seeks to avoid the consequences of his proceedings, and indirectly, through a ministerial officer, control, through the judiciary, the political management of the fiscal matters of the State.

Respectfully submitted,
WALTER H. ROGERS,
Attorney General, for Defendant.

APPENDIX.

No. 3.]

To provide for funding obligations of the State by exchange for bonds; to provide for principal and interest of said bonds; to establish a board of lliquidation; to authorize certain judicial proceedings against it; to define and punish violations of this act; to prohibit certain officers diverting funds, except as provided by law, and to punish violations therefor; to levy a continuing tax and provide a continuing appropriotion for said bonds; to prohibit injunctions in certain cases; to limit the indebtedness of the State, and to limit State taxes; to annul certain grants of State aid; to prohibit the modification, novation or extension of any contract heretofore made for State aid; to provide for the receipt of certain warrants for certain taxes, and to repeal all conflicting laws.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly* *convened*, That for the purpose of consolidating and reducing the floating and bonded debt of the State the Govenor, lieutenant-governor, auditor, treasurer, secretary of State and speaker of the House of Representatives are hereby authorized to cause to be prepared and to issue bonds to be known as "consolidated bonds of the State of Louisiana," of the denominations of one hundred, five hundred and one thousand dollars, to the amount of fifty millions of dollars, or so much thereof as may be necessary, all payable forty years from the first day of January, 1884, and all to be numbered consecutively and made payable to bearer, and to bear interest at the rate of seven pér cent. per annum, payable semi-annually in the city of New York and city of New Orleans, on the first day of July and January of each year, and coupons for such interest shall be annexed thereto; said interest and principal to be payable in lawful money of the United States.

Sec. 2. *Be it further enacted, etc.*, That the parties designated in the foregoing section shall constitute a board of liquidation, and a majority of said board shall elect a fiscal agent for the State, who shall be a member of said board.

Sec. 3. *Be it further enacted, etc.*, That said bonds authorized by section one shall be signed by the governor, auditor and secretary of State, and the coupons shall be signed by the auditor and treasurer, and when so prepared said bonds shall be exchanged by the board of liquidation for all valid outstanding bonds of the State and all valid warrants drawn previous to the passage of this act by the respective auditors of public accounts of the State on the treasurer thereof, except warrants issued by the auditor in payment of the constitutional officers of the State, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants; *provided* that the holder of any bonds or valid warrants rejected by a majority of said board may apply by petition to the proper court for relief, and if final judgment shall be rendered in his favor against said board it shall be the duty of said board to fund his claim in bonds at the rate provided by this act; *and provided further*, that if any member of said board of liquidation shall knowingly audit and fund any illegal claim against the State he shall be deemed guilty of a misdemeanor, and shall, on conviction, be fined not less than five thousand dollars and be imprisoned not less that two years, at the discretion of the court; and any person knowingly procuring the same to be done shall be subject to the same penalty.

Sec. 4. *Be it further enacted, etc.*, That the exchange of the bonds or valid warrants authorized by this act shall be effected by said board of liquidation in the cities of New Orleans and New York.

Sec. 5. *Be it further enacted, etc.*, That the consolidated bonds herein authorized shall be held and used by said board of liquidation only for the purpose of exchange as aforesaid; said bonds shall be used for no other purpose or purposes than as authorized by this act, and any member of the board of liquidation using or attempting to induce any person or persons to use said bonds or any of them for any other purpose or purposes, shall, on conviction thereof, be punished by a fine of not less than five thousand dollars and imprisonment at hard labor for not less than one year.

Sec. 6. *Be it further enacted, etc.*, That notice of the adoption of this act shall be published by said board in one or more journals of New Orleans, New York, London, Paris and Amsterdam.

Sec. 7. *Be it further enacted, etc.*, That a tax of five and a half mills on the dollar of the assessed value of all real and personal property in the State is hereby annually levied and shall be collected for the purpose of paying the interest and principal of the consolidated bonds herein authorized, and the revenue derived therefrom is hereby set apart and appropriated for that purpose and no other. And that it shall be deemed a felony for the fiscal agent or any officer of the State or board of liquidators to divert the said fund from its legitimate channel as provided, and upon conviction the said party shall be liable to imprisonment for not more than ten years nor less than two, at the discretien of the court. If there shall during any year be a surplus arising from said tax, after paying all interest falling due in that year, such surplus shall be used for the purchase and retirement of bonds authorized by this act, said purchases to be made by said board of liquidation from the lowest offers after due notice; *provided*, that the total tax for interest and all other State purposes, except the support of public schools, shall never hereafter exceed twelve and a half mills on the dollar. The interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest; and the said appropriation shall be a continuing annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the auditor and treasurer and the said board, respectively, to collect said tax annually, and pay said interest and redeem the said bonds until the same shall be fully discharged.

Sec. 8. *Be it further enacted, etc.*, That the bonds and valid warrants outstanding at the time of the passage of this act shall, as fast as they are received in exchange for consolidated bonds, be cancelled and destroyed by the said board of liquidation; and consolidated bonds purchased as provided for in section seven of this act shall be cancelled and destroyed after public notice has been given of the same in the official journal of the State, in the presence of as many citizens as may desise to be present. In like manner and within ten days after such destruction, in each case, a *proces verbal* of the same shall be published and a report made to the General Assembly on the first Monday of every year by said board.

Sec. 9. *Be it further enacted, etc.,* That it shall be the duty of the auditor in his next annual report, to give a detailed account of the proceedings had under this act, including the amount of new bonds issued, the amount of old bonds and valid warrants cancelled, the amount of the same outstanding and the cost of the exchange; and annually thereafter a full and exact statement of the condition of the public debt under the operations of this act.

Sec. 10. *Be it further enacted, etc.,* That any judge, tax-collector, or any officer of the State, obstructing the execution of this act, or any part of it, or failing to perform his official duty thereunder, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by imprisonment not exceeding five years or by fine not exceeding two thousand dollars, at the discretion of the court: *provided,* that this section shall in nowise prejudice or affect the criminal proceeding under section five of this act.

Sec. 11. *Be it further enacted, etc.,* That each provision of this act shall be and is hereby declared to be a contract between the State of Louisiana and each and every holder of the bonds issued under this act.

Sec- 12. *Be it further enacted, etc.,* That all grants of State aid made, whether of bonds, endorsements, subscriptions of stock or otherwise, which have become lapsed or forfeited, be and the same are hereby repealed and annulled, nor shall the State hereafter modify, novate or extend any contract heretofore made for the giving of State aid in any form or under any pretext.

Sec. 13. *Be it further enacted, etc.,* That the entire State debt, prior to the year of our Lord nineteen hundred and fourteen, shall never be increased, directly or indirectly, beyond the sum of fifteen millions of dollars, hereby authorized, it being the interest and object of this act and of the exchanges to be effected thereunder to reduce and restrict the whole indebtedness of the State to a sum not exceeding fifteen millions of dollars, and to agree with the holders of the consolidated bonds to be issued hereunder that said indebtedness shall not be increased beyond said sum during said period.

Sec. 14. *Be it further enacted, etc.*, That any tax collector who shall turn over any money or warrants by him collected, to any person except to the State treasurer, shall be deemed guilty of a misdemeanor, and shall, on conviction, be subject to the penalties prescribed in section ten of this act, and shall, in addition thereto, be liable in damages in double the amount so turned over. Any State officer requiring or demanding that said taxes shall be turned over to him, except the treasurer of the State, shall be liable, on conviction to the same penalties as are prescribed in this section.

Sec. 15. *Be it further enacted, etc.*, That from and after the passage of this act until the first day of July, 1874, all valid auditor's warrants issued for debts due prior to January 1, 1874, shall be received for all back taxes, licenses and interest and penalties thereon due prior to said first of January, 1874, except two mills for school fund, three mills for levee construction and repair fund, and two mills to the interest fund for the purpose of paying any interest in arrears accruing on the bonded debt of the State prior to the passage of this act.

Sec. 16. *Be it further enacted, etc.*, That no court or judge thereof shall have power to enjoin the payment of principal or interest of any bond issued under this act, or the collection of the special tax therefor, or to enjoin any officer of the State or parish in receiving warrants as is prescribed in section fifteen of this act.

Sec. 17. *Be it further enacted, etc.,* That all acts or parts of acts in conflict with this act or any section thereof are hereby declared to be repealed, and that this act shall take effect from and after its passage.

CHARLES W. LOWELL,
Speaker of the House of Representatives.
C. C. ANTOINE,
Lieutenant-Governor and President of the Senate.
WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

ACT No. 16 of 1869.

Sec. 7. "That in order to provide a fund for the semi-annual payment of interest upon the bonds issued in accordance with this act and the final redemption of said bonds, should the Mississippi and Mexican Gulf Ship Canal Company fail to meet the obligations set forth in the fourth and sixth sections of this act, when the deficit in interest to the year 1879, or the deficit and the annual instalment of $30,000 from that date to the final redemption of said bonds shall have reached the sum of $100,00, and as often thereafter as the said deficit shall have reached that sum, the auditor is hereby directed to determine by accurate calculation what rate of taxation on the total assessed value of all movable and immovable property in the State will be sufficient for the purpose of paying the said deficit in interest or annual instalments or both; and it shall be also his duty to notify the several sheriffs and collectors of the rate of taxation as ascertained and fixed for the purpose aforesaid, and said tax as ascertained and fixed is hereby levied upon all the movable and immovable property that may be assessed in this State; and it shall be the duty of the several sheriffs and tax-collectors to collect said tax, and the collection of the same shall be enforced as the law provides or may hereafter provide for the collection of taxes."

CONSTITUTION OF THE STATE OF LOUISIANA.

Art. 14.

The powers of the government of the State of Louisiana shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to wit: those which are legislative to one, those which are executive to another, and those which are judicial to another.

Art. 15.

No one of those departments nor any person or collection persons holding office in one of them, snall exercise power belonging to either of the others, except in the instance hereinafter expressly directed or permitted.

Art. 202.

Revenue and Taxation.

The taxing power may be exercised by the General Assembly for State purposes, and by parishes and municipal corporations, under authority granted to them by the General Assembly, for parish and municipal purposes.

Art. 209.

The State tax on property for all purposes whatever, including expenses of government, schools, levees, and interest, shall not exceed in any one year six mills on the dollar of its assessed valuation, if the ordinance regarding the bonded debt of the State is adopted and ratified by the people; and if said ordinance is not adopted and ratified by the people the State tax, for all purposes aforesaid, shall not exceed in any one year five mills on the dollar of the assessed valuation of the property, and no parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollar of valuation; and provided, that for the purpose of erecting and constructing public buildings, bridges, and works of public improvement in parishes and municipalities the rates of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the property tax-payers of such parish or municipality entitled to a vote under the election laws of the State and a majority of same voting at such election, shall have voted therefor.

Office Supreme Court U. S.
FILED.
JAN 31 1890
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 140.

STATE OF LOUISIANA, EX REL. NEW YORK GUARANTY AND INDEMNITY COMPANY, PLAINTIFF IN ERROR,

vs.

O. B. STEELE, AUDITOR, ETC., SUBSTITUTED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Argument of Mr. B. J. Sage for Defendant in Error, Thursday, January 23, 1890.

B. J. SAGE,
ALEXANDER PORTER MORSE,
Of Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 140.

STATE OF LOUISIANA, ex rel. New York Guaranty and Indemnity Company, Plaintiff in Error,

vs.

O. B. STEELE, Auditor, etc., Substituted, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Argument of Mr. B. J. Sage for Defendant in Error, Thursday, January 23, 1890.

Mr. Sage: If your honors please, the attorney general of Louisiana is at the moment engaged in a very important criminal procedure against parties who are charged with having robbed the treasury, or, at least, fraudulently used the State bonds. The case has been continued several times, I suppose, at the instance of both parties, and finally it was considered that the interests of public justice required speedy and prompt action. The attorney general, who was by himself, with only the district attorney to assist him, thought himself bound to remain in New Orleans, where the trial is in progress, instead of coming here to attend to these cases, and for that reason my colleague and myself are called upon very suddenly, without the opportunity to prepare; and, being obliged to depend upon the general resources of our minds for information, and required to address the Court under these circumstances, of course we feel the embarrassment of the situation, and throw ourselves upon the kindness, upon the patience, and almost the mercy of the Court.

In regard to the case that has just been presented so ably, we had better start with the prayer of the petition, which is—

"That a mandamus may issue herein according to law, commanding said Allen Jumel, auditor of public accounts of the State of Louisiana, to comply with his duty in the premises, under and in accordance with the act No. 116 of 1869, and especially under the seventh section thereof, by calculating the rate of taxation on all the movable and immovable property in the State sufficient to pay the deficit in interest on said issue of bonds, made under said act, from September 1, 1873, to September, 1883, say the sum of $200,000, or so much as may be necessary, and by notifying the several sheriffs and tax collectors throughout the State of said rate so ascertained and fixed, and requiring them, respectively, to collect the same in the manner provided by law for other taxes, and to do and perform such other act in the premises as may be his official duty, and for all other relief, and that, after due proceedings had, said mandamus may be made peremptory."

Your honors will perceive that the auditor of the State of Louisiana must have very considerable discretion, as the agent of that community called Louisiana, in the performance of all those duties that he is herein required to do under the mandamus of the Federal court. He therefore is precisely in the situation of the auditor in the case of Louisiana *vs.* Jumel (107 U. S., 711), because in this case the action of the auditor is intended to be varied, or diverted, or changed from the course that his superior, the State of Louisiana, requires him to pursue. I need not now dwell upon the case, for your honors will have it and the case of Jumel in your minds at the same time, and be able to make a comparison. I simply submit that these two cases are on all fours, in respect to the matter of interference by mandamus with the discretion of a State officer.

I come now to the vexed question, whether a State is subject to Federal jurisdiction, and I fancy that there is a good deal of difference among us all in reference to the fundamental principles involved.

It seems to me that it is important, at the very outset, in an argument of this kind, to determine the different grades of Government authority brought into action in all these proceedings. The political people of the country have the sovereign authority; they have expressed their will in the constitutions, both Federal and State. They create the institutions called the legislative, executive, and judicial departments of the Government. Necessarily, this Government, and the judicial department of the Government, are in the third grade of authority. If I might be permitted to make an illustration, I would draw a line directly beneath the ceiling on the opposite wall, and consider it as symbolical of sovereign authority. No one can object to considering it as representing sovereign power. I would draw next beneath that a line which I would use as a symbol of the Constitution; next beneath that, I would draw a third line, and call that a symbol of Government; and next beneath it I would draw a fourth line, and consider it as a symbol of the persons and things that governments govern. Now, it is impossible for the bottom grade to get on top, or even the third grade (including this august assemblage, the Supreme Court of the United States), to get above and coerce the sovereign authority. No matter whether we consider our system as one nation or 42 States; sixty millions of people, or 42 different communities or commonwealths of people, the question still is, and always will be, whether that sovereign authority can be dominated by the Government, which is in the third grade. I presume that in the case of U. S. *vs.* Cruikshank it was simply intended to confine the Court's expressions to matters of government and jurisdiction, and that it was not intended to say that this Court or the Government could have dominion over the political bodies of people that form the great mass of our nation.

Now, if your honors please, having started with that kind of demonstration (speaking, as I hope, with great deference, and becoming modesty), I will try to make some points clearer than they are in the minds of many who are disputing on this great topic. I argued this whole matter in 1879 or 1880, with the possibility at that time of filing the argument as *amicus curiæ* in this Court, and I beg leave to read this passage therefrom:

> "In considering questions involving the parties to and obligations of and the remedies on Government bonds it must always be kept in mind that *one party is above, the other beneath, the law.* In every transaction of a person with a State, or with the association of States, these relative positions are maintained; one is subject to judicial coercion, while the other is not. Every Federal or State bondholder contemplated this and agreed to it. He can have no judicial aid to compel either the State or the United States to

pay a bond. He must rely for his payment alone on the obligor's good faith. The alternative is war. This is plain common sense, and is the principle recognized by Mr. Webster in his celebrated Baring letter of 1839; and I know of no eminent publicist who ever thought otherwise.

"Such contract consists of essential obligations and qualities, and is an entity with a make-up and character established at its origin. Mere transfer from a private party to a State cannot so change it that rights of action will spring from it which could not do so originally. Is such bond technically a chose in action? Surely the heart of it—in other words that which is bought and sold, the thing of value—is a government promise, a sovereign's faith. Further on I think we shall see clearly that there can be no judicial cognizance of it."

Further along (in the same argument) I deal with the nature and extent of the State's obligation; I will not trouble the Court by reading it, but will express it in as few words as I can: When a State undertakes to make an obligation for the purpose of putting it upon the markets of the world, or when the United States Government does the same thing, she puts her faith, her honor, in a bond which evidences the obligation; and, being above suit—being above the law, having made the law—whether it is the United States or a State, the obligor has simply offered in the markets of the world, as it were, a piece of their or her good faith and honor. It is not and cannot be a chose in action, and no right of action can spring from it, and, for that reason, it is said and recognized by all courts that the governing power—*i.e.*, the Union or a State—cannot be sued without its own consent. This consent is indispensable, and takes the place of the coercive jurisdiction that obtains in all other cases. Where an individual or corporation is brought as a party before the court, it is done by virtue of coercive jurisdiction; but when the State comes before the court, she must come voluntarily; she is above suit, and she submits the issue that may have arisen between her and the party with whom she has dealt. She submits the case, and the Constitution speaks of controversies, &c., as things that are independent of the persons who are parties to them, whether political or natural persons. The ground of this Court's jurisdiction over the political people of the country (if or when it has any) is the consent of that political people to appear in court and be impleaded, and fight the battle that may be tendered on the other side, and submit to the judgment, and comply with that judgment in good faith when it is rendered.

As I deal with that subject a little further along in that argument, I beg leave to call your honors' attention to the reasoning which I will read as a substitute for what I would say now—perhaps with less force.

> "But there is, if possible, a more serious objection than any yet considered. This debt is owed by the people in their governing capacity, and it is the property and means they hold for governmental purposes which are sought to be executed; and it is the same, whether we adopt the theory of State or National sovereignty. Suppose we admit, for argument's sake, the latter, namely, that *the States govern by virtue of the nation's delegative authority, having no status or rights but what the nation has given them.* As people, therefore, they are integral parts of the nation, charged by it with the major portion of the functions of government, and holding from it in trust the public property and means consecrated to governmental purposes. Now, we can see how absurd it would be for the judicial servitors of this great unity of government to be ordered to attack the other institutional parts of the same government, and seize and sell all the material means they hold in trust for performing their duties; so that the national theory does not help the opposition at all. To give the Government coercive power over itself or any portion of itself—power to seize and sell its own means, power to mandamus or enjoin all its parts in detail—is like attempting, as Governor Sullivan aptly said, 'to erect a temple beneath its own foundations.'"

The argument then proceeds to show that no means exist to make a State pay, and that there can be no possible power, method, or machinery by which it can be done.

This brings us back to the case of Louisiana *vs.* Jumel, 107 U. S., 711, as governing the case at bar. In both, the suit is practically against the State, as the former was held to be; and in both the Federal court's *mandamus* is invoked for the control of the State's agents, in their levying, collecting, and disposal of the State's revenues. There had been no appropriation or setting apart or transfer by law, of money of the State for these bonds; and I submit that it seems to be the view of the court in this Jumel and other cases, that there must be the equivalent of a transfer and delivery, or that the auditor or the treasurer or both must be required by the State law to do something that is a mere ministerial or clerical duty, before the beneficiary can have the mandamus for the purpose of getting what is his due. There was no setting apart, no transfer, no appropriation in either of the cases. In Louisiana, some fifteen or more years ago, the idea was common that these contracts imported continuing appropriations, and that the officer of the State was to set apart the amount that was necessary to comply with the obligations, and virtually transfer it, and place it beyond the State's control; but I understand the result of the Jumel case and the case of Christmas *vs.* Russell, 14 Wall., 69, taken together, to be that a promise of payment, no matter how clear, specific, and solemn, or even a setting apart of funds in the treasury, is no assignment or consummation of the contract, even in equity. Delivery or at least the putting of the payment out of the promisor's and in the promisee's control is required.

This doctrine is conclusive in regard to this case. There has been nothing done that placed the fund in the charge of the auditor, or the treasurer, or any other proper officer, who could be reached by *mandamus* to compel him to perform a ministerial duty. Where the officer has the slightest discretion there can be no mandamus. When he occupies a certain field of duty, and has discretion in regard to it, the judicial authority cannot come in and say, "You must act as we order in the duty which the law and your own mind require *you* to do; in other words, in the exercise of your discretion under the law you must take our discretion instead of yours."

The State of Louisiana has been placed in a very unfortunate predicament in having her political government taken out of her hands, and in being reduced to subjection to outside persons, who, as a general rule, had no motive except to enrich themselves and carry out partisan designs. This particular case has been considered generally, though I think not entirely justly, as one of that class of cases that belong to what the Hon. Geo. Ticknor Curtis called the "lynching" of Louisiana—that is to say, the State was deprived of her volition or freedom, and her means were taken against her will, to a very large extent, in the way of taxation, in the issuing of her bonds, and the increasing of her debt.

For instance, there was one case where, in regard to the Chattanooga Railroad Company, there was a subscription of the State required of twenty-five hundred thousand dollars of bonds for the purpose of making a road that was unnecessary, and only about thirty yards of dirt were ever thrown in compliance with the requirements of the charter, and yet the bonds were issued and became an obligation of the State. That was one of the numerous abominations that the public authorities of the State were obliged to prevent or defeat. Another case was the issue of eighty thousand dollars of bonds and making them payable to the Governor personally, and his transferring these bonds by simple endorsement. They went into the hands of third parties and no work was ever done (Cecil *vs.* Board of Liquidation, 30 La. An., 34). A great many cases of that kind occurred, but I think in this there was at first an intention to accomplish the purpose of the charter and of the State aid. The question now simply is whether the State can be made responsible by suit against her when she has not given consent.

In regard to the arguments made [in the series of cases now engaging this Court's attention—*e. g.*, the Virginia coupon cases, Hans *vs.* La., Temple *vs.* N. C., and the important one now at bar], though all are worthy of attention, some contain more or less of error to be eliminated. I submit, for instance, that one of the arguments in the last case, based upon the proceedings of the convention of 1787, is full of historical error; and, therefore, that it is necessary for me to state the fact and the fundamental principle that *the Constitution itself* is the *result* of all these deliberations, and that hence, supposing it to be adduced as an instrument of evidence, it is to be taken for what its language is worth, and no evidence to alter or vary any portion of it would be allowed by any court. As that is the case, we have very little to do with what happened previous to the adoption of the instrument, except for the purpose of getting historical facts to throw light upon what meaning the different portions of it may have had, in case there be any doubt or ambiguity of different passages.

I will make one remark about the matter of the eleventh amendment. I submit that the case of Chisholm *vs.* Ga. is not an authority to be adduced to this Court, and is not